

**Gaies v Hulbert**

2021 NY Slip Op 33598(U)

January 14, 2021

Supreme Court, Albany County

Docket Number: Index No. 906543-18

Judge: Margaret Walsh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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MITCHELL GAIES and SUSAN SIKULE,

Plaintiffs,

**DECISION and ORDER**

Index No. 906543-18

-against-

JOHN HULBERT,

Defendant.

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(Supreme Court, Albany County, Motion Term)

(Hon. Margaret Walsh, Supreme Court Justice, Presiding)

APPEARANCES:

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Walsh, J.:

The Plaintiffs commenced this action on October 23, 2018 seeking damages from the Defendant arising from an incident that occurred on July 15, 2018, when two German shepherd dogs owned by the Defendant escaped from the Defendant's yard, entered the property of Plaintiff Mitchell Gaies and fatally mauled the Plaintiffs' cat, Manny. In addition to the loss of Manny, the Plaintiffs allege that they suffered bites and other injuries stemming from the attack. In their verified complaint, the Plaintiffs assert causes of action for negligence, strict liability, and negligent infliction of emotional distress. The Defendant now moves for partial summary judgment dismissing the cause of action for negligent infliction of emotional distress and limiting damages for the loss of the cat to his fair market value, if any. The Plaintiffs oppose.

“A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact” (*Giuffrida v. Citibank Corp.*, 100 NY2d 72, 81 [2003]). The Court must view evidence in the light most favorable to the nonmoving party and all reasonable inferences must be resolved in favor of the nonmoving party (*see Escobar v. Velez*, 116 AD2d 735, 735 [2d Dept. 2014]). If the movant makes such a showing, the burden then shifts to the nonmoving party to tender evidence in admissible form sufficient to raise a material issue of fact requiring resolution at trial (*Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The Court is mindful of its obligation to “focus on issue finding rather than issue determination, and [to] deny the drastic remedy of summary judgment if there is any doubt as to whether a material factual issue exists or if such an issue is even arguable” (*Lacasse v. Sorbello*, 121 AD3d 1241, 1242 [3d Dept. 2014], quoting *Black v. Kohl's Dept. Stores, Inc.*, 80 AD3d 958, 959 [2011]; *see also Napierski v. Finn*, 229 AD2d 869 [3d Dept. 1996]) “summary judgment is a drastic remedy that should not be granted

where there is any doubt as to the existence of a triable issue”)). In support of his motion, the Defendant proffers the verified pleadings, signed transcripts of the Plaintiffs’ depositions, as well as the Plaintiffs’ Verified Bill of Particulars, Plaintiffs’ Supplemental Verified Bill of Particulars and medical records.

“A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred, when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses ‘some guarantee of genuineness (*Ornstein v. New York City Health & Hosps. Corp.*, 10 NY3d 1, 6 [2008])[internal quotations marks and citations omitted]; *Kennedy v. McKesson Co.*, 58 NY2d 500, 506 [1983]; 61 NY Jur, *Negligent Infliction of Emotional Distress*, §17). Further, “[w]hile physical injury is not a necessary element of a cause of action to recover damages for negligent infliction of emotional distress, such a cause of action must generally be premised upon conduct that unreasonably endangers a plaintiff’s physical safety or causes the plaintiff to fear for his or her own safety” (*Gaylord v. Fiorilla*, 28 AD3d 713, 713-714 [2d Dept. 2006], quoting *Perry v. Valley Cottage Animal Hosp.*, 261 AD2d 522, 522-523 [1999]; see also *Schultes v. Kane*, 50 AD3d 1277, 1278 [3d Dept. 2008]; *Graber v. Bachman*, 27 AD3d 986, 987 [3d Dept. 2006]; *Sheila C. v. Povich*, 11 AD3d 120, 130 [1<sup>st</sup> Dept. 2004]).<sup>1</sup>

The salient facts drawn from their depositions are deemed true for purposes of this motion, as well as all favorable inferences therefrom. The Plaintiffs Susan Sikule (“Sikule”) and Mitchell Gaies (“Gaies”) co-owned a ten-year-old cat named Manny (“Manny”). Gaies owned a home located at 14 Northview Drive in Latham. At that time, the Plaintiffs were a couple. The Defendant

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<sup>1</sup>While the Plaintiffs allege the Defendant’s extreme and outrageous conduct, such allegation is no longer deemed an essential element to a cause of action for negligent infliction of emotional distress (see *Stephanie L. v. House of the Good Shepherd*, 186 AD3d 1009, 1014 [4<sup>th</sup> Dept. 2020]; *Taggart v. Costabile*, 131 AD3d 243, 254-255 [2d Dept. 2015]).

owned a home at 11 Northview Drive, located across the street from Gaies, where he kept two German shepherd dogs. In the late afternoon of July 15, 2018, Manny was tethered to a stake in the backyard of the home of Gaies, and Gaies was supervising him, sitting on the raised deck some distance from where Manny was sitting. Sikule was inside Gaies' home playing board games with Gaies' grandchildren in the great room which overlooked backyard. At one point, Sikule heard Gaies scream or yell. Gaies saw two full grown German shepherd dogs enter his backyard and immediately go after Manny. Sikule went to the sliding glass door and observed one dog on either end of Manny, pulling him apart. She saw a "very large gaping hole in [Manny's] belly and he's still alive at that point" (Exhibit G, p. 13). Gaies similarly described Manny as being a "rag doll being torn apart" (Exhibit H, p. 16). Sikule opened the sliding glass door and ran down to the scene of the attack. Gaies had already run down from the deck to remove one of the dogs from its grip on Manny. Sikule tried to pry one of the dog's mouth open, while Gaies was trying to get the other dog off of Manny using both of his hands. Neither dog would release Manny. Both Plaintiffs described the dogs as being fixated on Manny. The Defendant ultimately came into the yard to retrieve his dogs after hearing the Plaintiffs' screams. After the attack, the Plaintiffs rushed Manny to the nearest veterinary hospital, but Manny was fatally wounded by the Defendant's dogs. Sikule, a veterinarian who specializes in treating cats, testified that the incident has impacted her emotionally. She was unable to go to work for a week not only due to her physical injuries but also due to the "horrific event and nature of" Manny's fatal mauling (Exhibit G, p. 35). She was diagnosed with post-traumatic stress disorder and now thinks "about the [e]ffects of a possible dog attack" when she sees an unfamiliar dog while out running (Exhibit G, p. 36). Gaies testified that he saw a psychologist due to the attack. He also has become fearful of certain breeds of unfamiliar dogs (Exhibit H, p. 47-48).

The Defendant argues that no claim for emotional distress lies as the result of the negligent destruction of one's property or for emotional distress caused by the observation of damage to one's property (*Satchell Aff.*, ¶16, citing, *inter alia*, *Dabb v. NYNEX Corp.*, 262 AD2d 1079, 1079-1080 [4<sup>th</sup> Dept. 1999]; *see also Jones v. County of Chenango*, 180 AD3d 1199 [3d Dept. 2020]). The Defendant contends that, because domestic pets such as Manny are considered to be property (*see Fowler v. Ticonderoga*, 131 AD2d 919, 921 [3d Dept. 1987]), the Plaintiffs' cause of action for negligent infliction of emotional distress fails. The admissible proof submitted in support of his motion reveals that a source of the Plaintiffs' emotional distress arose from their having witnessed the fatal mauling of Manny by the Defendant's dogs. In *Fowler v. Ticonderoga*, the plaintiff, who witnessed the killing of his dog by the town's animal control officer, sought damages for negligent infliction of emotional distress. The Appellate Division, Third Department held that, because the plaintiff was not in the "zone of danger" as plaintiffs were in *Bovsun v. Sanperi*, 61 NY2d 219, 230-231 (1984)<sup>2</sup> and because the dog was personal property, "damages may not be recovered for mental distress caused by [the dog's] malicious or negligent destruction" (*id.*, citing *Smith v. Palace Transp. Co.*, 142 Misc. 93, 94; *accord, Jason v. Parks*, 224 AD2d 494, 495 [2d Dept. 1996][damages for emotional distress caused by loss of dog not recoverable]; *Schrage v. Hatzlacha Cab Corp.*, 13 AD3d 150, 150 [1<sup>st</sup> Dept. 2004]; *Dabb v. Nynex Corp.*, *supra* at 1079-1080). The Defendant has met his initial burden of establishing with admissible proof his entitlement to dismissal of the third cause of action as a matter of law.

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<sup>2</sup>A plaintiff who observes the death or serious injury of a member of his or her immediate family, where the defendant's negligence likewise exposes the plaintiff to an unreasonable risk of bodily harm—i.e., that such plaintiff was also within the "zone of danger"—may recover for emotional distress (*Bovsun v. Sanperi*, 61 NY2d at 230-23. In *Bovsun*, the Court of Appeals recognized the right of a plaintiff to recover those damages "attributable to emotional distress caused by contemporaneous observation of injury or death of a member of the immediate family caused by the same conduct of the defendant" (*id.* at 233).

In opposition, the Plaintiffs do not dispute Manny's legal classification as "personal property." Rather, they point to other portions of their deposition testimony describing physical injuries inflicted upon them by the Defendants' dogs during their attack that resulted in Manny's fatality. The Plaintiffs argue that the "entire attack both to the cat as well as to their persons are the foundation [of] the claims of psychological damages" (*Rust Aff. in Opposition*, ¶12). The fully stated rule is that recovery for emotional distress may not be predicated upon the observation of damage to one's property in the absence of an assertion that a plaintiff was in physical danger or was placed in imminent fear of his or her own safety (*Allstate Ins. Co. v. Burger King Corp.*, 25 AD3d 472, 472 [1<sup>st</sup> Dept. 2006]; *Graber v. Bachman*, 27 AD3d at 988; see also *Nicholson v. A. Anastasio & Sons Trucking Co.*, 77 AD3d 1330, 1331-1332 [4<sup>th</sup> Dept. 2010]; *Cleary v. Wallace Oil Co., Inc.*, 55 AD3d 773 [2d Dept. 2008]; *Kenneth S. v. Berkshire Farm Ctr. & Servs. for Youth*, 36 AD3d 1092, 1094 [3d Dept. 2007]; *Graber v. Bachman*, 27 AD3d 986, 988 [3d Dept. 2006][citing *Dabb v. NYNEX Corp.*, supra]). Stated another way, a defendant may be liable in damages for emotional injuries where the defendant's breach of duty not only causes property damage but also proximately causes a plaintiff to be placed in physical danger or in imminent fear of his or her own safety (see also *Perry v. Valley Cottage Animal Hosp.*, 261 AD2d 522, 522-523 [2d Dept. 1999]). Here, the Defendant owed a duty directly to the Plaintiffs to properly restrain, harbor and supervise his German shepherd dogs, deemed vicious for purposes of this motion, including keeping them from entering Gaies' property (see *Young v. Wyman*, 159 AD2d 792, 793 [3d Dept. 1990], *aff'd* 76 NY2d 1009, 1010 [1990]; *Buchanan v. Stout*, 139 AD 204, 204-205 [2d Dept. 1910]). Viewing the evidence in a light most favorable to the Plaintiffs on this motion, the Defendant breached these obligations when his dogs, unsupervised and unrestrained, left the Defendant's property and entered Gaies' backyard. As a result of the Defendant's breach, his dogs

attacked Manny in Gaies' backyard. Sikule testified both that she could have been bitten and was bitten multiple times during what she described as the dogs' "frenzy of attack" (Exhibit G, p. 18). Gaies testified that, after prying one dog off Manny momentarily, the dog shook his head and then struck Gaies in the chest with such force as to knock him down, causing injuries to his ribs (Exhibit H, pp. 18-19). According to the Plaintiffs, the dogs' attacks on Manny and on them resulted in severe emotional trauma in addition to physical injuries. The foregoing evidence raises material issues of fact as to whether the Defendant's failure to restrain and supervise his dogs also placed the Plaintiffs in physical danger and/or in imminent fear of harm and whether his breach was the proximate cause of their alleged emotional distress arising from the attacks on Manny and on them. The Court finds that the foregoing evidence, viewed in a light most favorable to the Plaintiffs, raises material issues of fact sufficient to defeat the Defendant's motion.

The Court turns to the Defendant's motion insofar as it seeks to limit other damages that relate to the loss of the Plaintiff's cat insofar as they are sought under the remaining two causes of action (*Satchell Aff.*, ¶2; see Exhibit A, ¶¶ 33, 38-39, 45). A plaintiff who suffers the loss of a companion animal is limited to recovery of the animal's fair market value (*see Newmark v. Animal Emergency Clinic of Hudson Val.*, 38 AD3d 1110, 1111 [3d Dept. 2007]; *DeJoy v. Niagara Mohawk Power Corp.*, 13 AD3d 1108, 1109 [4<sup>th</sup> Dept. 2004]; *Lewis v. DiDonna*, 294 AD2d 799, 800-801 [3d Dept. 2002]; *Zager v. Dimilia*, 138 Misc.2d 448, 450 [Justice Ct, Village of Pleasantville, Westchester Cty 1988][noting that original rule of value originated in cases involving working animals, valued for herding and other skills, or show animals prized for their pedigree]). Loss of companionship of a pet is not a recoverable element of damages (*Lewis v. DiDonna*, 294 AD2d at 800-801)[rejecting loss of companionship as an element of damages for the loss of dog which had died from having been given the incorrect dosage of medication as

prescribed by a pharmacist]; *Hayes v. Akam Asso., Inc.*, 2019 NY Slip Op 32853[U][Supreme Ct, New York Cty 2019]; *cf. Mercurio v. Weber*, 2003 NY Slip Op 51036[U][Nassau Cty, District Court, Second District 2003]; *Brousseau v. Rosenthal*, 110 Misc.2d 1054 [1980]). However, veterinarian expenses incurred as the result of injuries to a companion animal are properly recoverable (*Graham v. Gu*, 2020 NY Slip Op 30827[U][Supreme Ct, Kings Cty, March 9, 2020]; *Lowenberg v. Krause*, 2015 NY Slip Op. 31856 [Supreme Ct, New York Cty 2015]; *Marsh v. Della Femina*, 12 Misc.3d 1157[A][Supreme Ct, New York Cty 2006]; *Nardi v. Gonzalez*, 165 Misc.2d 336 [City Court, City of Yonkers, 1995]). The Plaintiff did not oppose this aspect of the motion. Thus, the Court grants the Defendant's motion in part by limiting the Plaintiffs' damages arising from the loss of their cat under the first two causes of action to his fair market value at the time of his death together with veterinarian expenses, if any, incurred by the Plaintiffs.

Those arguments not addressed herein were deemed unpersuasive or were otherwise rendered academic.

Accordingly, for the reasons set forth above, it is hereby

**ORDERED**, that the *Motion for Partial Summary Judgment* filed by the Defendant is denied in part and granted in part to the extent decided herein.

This constitutes the *Decision and Order* of the Court. A digital *Decision and Order* electronically signed by the Hon. Margaret Walsh, Supreme Court Justice, is being uploaded to the case record in this matter maintained on the NYSCEF website whereupon it is to be entered and filed by the Office of the Albany County Clerk. Counsel for the **Defendant** is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means,

whichever may be appropriate dependent upon the filing status of the party. (Please note that section 202.5b(b)(2)(I) of the Uniform Rules of Supreme and County Courts directs that service upon non-participating parties must be made in hard copy.)

So Ordered.

Dated: January 14, 2021  
Albany, New York.



Margaret Walsh  
Supreme Court Justice

ENTER:



01/15/2021

Papers considered:

- (1) *Notice of Motion for Partial Summary Judgment* filed on October 28, 2020, by Kyle Satchell, Esq., (of counsel, Santacrose & Frary), attorneys for the Plaintiff, with *Affirmation* of Kyle Satchell, Esq., filed on October 28, 2020 and Exhibits A through J annexed (NYSCEF docs nos. 18-29);
- (2) *Affirmation in Opposition* of Christopher W. Rust, Esq., affirmed November 25, 2020; *Memorandum of Law in Opposition* filed on November 25, 2020 by Christopher Rust, Esq. (of counsel, The Towne Law Firm, P.C.) (NYSCEF doc. nos. 30 and 31);
- (3) *Affirmation in Reply* of Kyle Satchell, Esq., filed on December 1, 2020 (NYSCEF doc. no. 33).