

Decollibus v Schimmel
2022 NY Slip Op 30172(U)
January 19, 2022
Supreme Court, New York County
Docket Number: Index No. 160127/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID B. COHEN PART 58

Justice

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INDEX NO. 160127/2019

JOAN DECOLLIBUS,

MOTION SEQ. NO. 001

Plaintiff,

- v -

DECISION + ORDER ON MOTION

BARRY SCHIMMEL,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY

In this negligence action, Defendant Barry Schimmel moves for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety. Plaintiff Joan Decollibus opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is granted.

I. Factual and Procedural Background

On April 25, 2019, Plaintiff was riding her bicycle through Central Park when Defendant's dog ("Lola") ran into the bicycle lane and caused Plaintiff to fall of her bike. On October 18, 2019, Plaintiff commenced this action alleging negligence, strict liability, and violations of the City of New York Department of Parks and Recreation 56 RCNY § 1-04 (i)(1)(2) and (3).

II. Plaintiff's EBT

At the time of the accident, Plaintiff was riding her bicycle (Plaintiff's EBT at 17). Lola, who was off her leash, ran into the roadway and collided with Plaintiff's bicycle causing Plaintiff to fall over (id. at 28). Lola never growled, barked or bared her teeth at plaintiff (id. at 30).

III. Defendant's EBT

Defendant owned Lola, a Spanish Water dog (Defendant's EBT at 9-10, 18). Before the accident, Defendant and Lola, off-leash, played fetch without any incident for approximately twenty minutes (id. at 56). Immediately before the accident occurred, Defendant threw the ball toward Lola and the ball rolled toward the roadway (id. at 59). Defendant and Lola both ran after the ball (id.) While Lola was in the roadway retrieving the ball, Plaintiff swerved to avoid Lola and fell (id. at 59-61). Prior to the subject accident, Lola had never run into the roadway (id. at 79) or chased squirrels (id. at 65-66).

IV. The Affidavit of Eric Alber

Eric Alber ("Alber"), "certified master dog trainer and canine behavior specialist", stated that "Lola ... exhibited what is known as a 'high prey drive' meaning that Lola would chase and pursue objects [and] would not alter her behavior based on the environment" (Doc 33). Alber did not examine Lola.

V. The Parties' Contentions

Defendant argues that this action should be dismissed because New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a dog, that Plaintiff's strict liability claim fails where Lola's actions constituted normal canine behavior, and that Lola never acted in a vicious manner and there is no evidence that Defendant knew or had reason to know of any prior vicious propensities.

Plaintiff, in opposition, argues, inter alia, that Lola "chase[d] tennis balls" and, therefore, had a propensity to interfere in traffic (Doc 25 ¶ 24).

In further support of his motion, Defendant argues that "Lola ran after a stray ball during a game of fetch which inadvertently rolled into the roadway and [he] could not recall whether he commanded Lola to stop" (Doc 37 ¶ 8).

VI. Legal Conclusions

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). “This burden is a heavy one,” requiring that the “facts . . . be viewed in the light most favorable to the non-moving party” (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). “Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad*, 64 NY2d at 853). Once met, the burden shifts to the opposing party, who must establish the existence of a triable issue of fact to defeat the summary judgment motion (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The argument by Plaintiff’s lawyer that Defendant unlawfully let his dog off leash is meritless since “[i]t is well settled that a cause of action for ordinary negligence does not lie against the owner of a dog that causes injury” (*Buicko v Neto*, 112 AD3d 1046, 1046 [3d Dept 2013] [internal citations omitted] [emphasis added]; see also *Scavetta v Wechsler*, 149 AD3d 202, 206 [1st Dept 2017] [“[E]ven where a plaintiff presents some evidence of negligence—e.g., the defendant’s violation of a local leash law—the evidence is irrelevant because negligence is [not] a basis for imposing liability”] [internal citations and quotations omitted]).

The sole viable claim against the owner of a dog that causes injury is one for strict liability (*Buicko*, 112 AD3d at 1046). “To recover in strict liability 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” (*Drakes v Bakshi*, 175 AD3d 465, 465 [2d Dept 2019] [internal citations omitted]). Vicious propensities include the propensity to do any act that

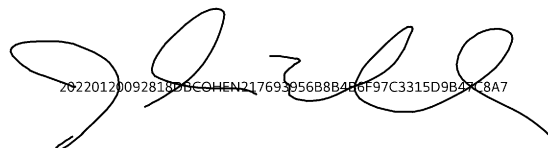
might endanger the safety of the persons and property of others (id. at 465 [internal citations omitted]). “[A] dog's habit of chasing vehicles or otherwise interfering with traffic could be a ‘vicious propensity’” (*Buicko*, 112 AD3d at 1047). “[I]n the absence of proof that [the dog] has a history of chasing bicycles or vehicles or otherwise interfering with traffic, “there is no basis for the imposition of strict liability” (id.).

Here, Defendant made a prima facie showing of entitlement to judgment as a matter of law by demonstrating, through his deposition testimony, that he neither knew, nor should have known, that Lola had any tendency to chase bikers or otherwise interfere with traffic or was vicious in any other way (see *Buicko*, 112 AD3d at 1047; see also *Doerr v Goldsmith*, 25 NY3d 1114, 1116 [2015]; *Antinore v Ivison*, 133 AD3d 1329 [4th Dept 2015]; *Alia v Fiorina*, 39 AD3d 1068, 1069 [3d Dept 2007]). In opposition, Plaintiff failed to raise any triable issues of fact. Alber’s affidavit is insufficient to raise a triable issue of fact since it is conclusory and speculative (*O'Brien v Vil. of Babylon*, 196 AD3d 494 [2d Dept 2021]) and, further, his opinion that Lola had high prey drive was refuted by Defendant’s deposition testimony that Lola did not chase squirrels (Defendant’s EBT at 65-66). The parties’ remaining contentions are unavailing.

Accordingly, it is

ORDERED that the motion by Defendant Barry Schimmel for summary judgment is granted and the complaint is dismissed.

1/19/2022
DATE


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DAVID B. COHEN, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
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