

Leddy v Whorton

2022 NY Slip Op 31744(U)

June 1, 2022

Supreme Court, New York County

Docket Number: Index No. 157494/2020

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

ERIN LEDDY,

Plaintiff,

- v -

LINDSEY WHORTON, STEFFEN WHORTON

Defendant.

-----X

INDEX NO. 157494/2020

MOTION DATE 05/27/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
 MOTION**

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

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

The parties herein were friends and neighbors. Plaintiff commenced this action seeking damages because she was bitten by defendants’ dog, Tom Collins. Defendants have moved for summary judgment. For the reasons stated below, the motion is denied.

ALLEGED FACTS

The incident occurred on February 23, 2019, while plaintiff was a guest within defendants’ apartment. As a result of the bite, plaintiff sustained scarring to her nose, forehead and eyebrow. Defendants had invited plaintiff and her husband over to celebrate their impending move to Inwood.

Defendant Steffen Whorton (SW), plaintiff and Steve Walsh (Walsh), plaintiff’s husband, were the only people in the apartment. Tom Collins had sat next to plaintiff, and plaintiff pet him. As plaintiff bent down to pet him, Tom Collins lunged at her and bit her face.

Defendants have owned Tom Collins since 2013. Defendants allege that when they adopted Tom Collins, they were told that Tom Collins might have been abused. As such, defendants were warned that there was potential for him to attack. Tom Collins growled at guests prior to this incident and would often get startled. Tom Collins could be a nervous dog.

Prior to this occurrence, defendants felt it necessary to warn guests not to “reach out” to Tom Collins. Defendants did this because it was a “rule” that they were told to follow. Indeed, Defendants felt it necessary to warn every guest about Tom Collins for the approximate five (5) years that they owned the dog prior to the subject occurrence.

Defendant Lindsey Whorton (LW) was always cautious with Tom Collins. Further, LW told plaintiff that had she been present on the evening of the occurrence, she would have been more cautious with regard to Tom Collins and would have told plaintiff not to pet Tom Collins.

SW also testified that in the five years prior to this incident he warned every guest about Tom Collins. Every time defendants had guests over SW would advise the guests not to reach at the dog, not to get down on to his level, and to ignore Tom Collins. SW stated he gave this warning to keep Tom Collins from nipping, barking, lunging, showing his teeth, getting defensive or getting aggressive. Defendants had been warned that Tom Collins could do such things.

Prior to the date of this occurrence, plaintiff had met Tom Collins approximately three (3) times. All of these three occasions were inside defendants’ apartment. Tom Collins had previously lunged at plaintiff and snapped at her and lunged at her husband. Defendants had witnessed this and, reprimanded the dog and removed him from plaintiff’s vicinity.

DISCUSSION

CPLR §3212(b) provides that a motion for summary judgment "shall be denied if any party shall show facts sufficient to require a trial of any issue or fact." Because summary judgment is a drastic remedy that deprives the litigant of his day in court, it should only be granted where no real facts question is presented. *Andre v. Pomerov*, 35 N.Y.2d 361 (1974).

The proponent of a motion 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. *Zuckerman v. City of NY* 49 N.Y.2d 557 (1980). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York University Med. Ctr.*, 64 N.Y.2d 851 (1985); *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). The adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden. *Bray v. Rosas*, 29 A.D.3d 422 (1st Dep't 2006).

Facts on a summary judgment motion must be viewed in the light most favorable to the non-moving party. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 (2012). The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395). "If there is any doubt as to the existence of a triable issue, the motion should be denied [*Grossman v. Amalgamated Haus. Corp.*, 298 A.D.2d 224, 226 (1st Dept 2002)]."

"(T)he owner of a domestic animal 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 N.Y.3d 444, 446 (2004). "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." *Id.* "Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice". *Id.*

"[A] triable issue of fact as to knowledge of a dog's vicious propensities might be raised - even in the absence of proof that the dog had actually bitten some-one - by evidence that it had been known to growl, snap or bare its teeth" *Collier v. Zambito*, 1 N.Y.3d 444, 446 (2004). "In addition, an 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 of harm, can be found to have vicious propensities - albeit only when such proclivity results in the injury giving rise to the lawsuit". *Id.*

In this case the court finds that the record poses a question of fact as to whether defendants knew or should have known of Tom Collins' propensity to bite or harm others. While defendants deny such knowledge in their moving papers, they admit to a strict adherence of a set of warnings about Tom Collins to all visitors to their home. While they assert such warnings are standard and should be given by all dog owners, this is entirely a self-serving statement without any other support. Additionally, plaintiff's testimony is that defendants had previously observed the dog lunging at her and her husband. The prior instances of lunging, snapping growling along with defendants' policy of strict warnings are sufficient to create a question are sufficient to create a material question of fact as to whether defendants knew or should of known of Tom Collins' propensity to harm others.

Based on the foregoing, the motion for summary judgment is denied.

WHEREFORE it is hereby:

ORDERED that defendants' motion for summary judgment is denied; and it is further

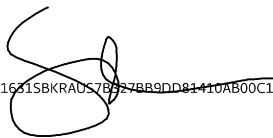
ORDERED that the parties appear for a virtual settlement conference with the court on June 21, 2022 at 11:00 am; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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6/1/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: