

Borra v Labaton
2023 NY Slip Op 35201(U)
March 22, 2023
Supreme Court, Queens County
Docket Number: Index No. 711071/2020
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. PHILLIP HOM

PART

14

Justice

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JOY BORRA and MARLENE BORRA

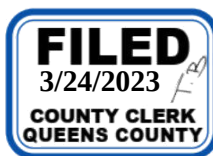
INDEX NO. 711071/2020MOTION DATE 01/19/2023

Plaintiffs,

MOTION SEQ. NO. 001

- v -

JULIA LABATON,

DECISION + ORDER ON
MOTION

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

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that Defendant's motion for summary judgment is determined as follows:

Plaintiff Joy Borra ("Joy") commenced this action to recover for injuries sustained when he was bitten by a dog belonging to Defendant Julia Labaton ("Defendant"). Co-Plaintiff Marlene Borra joined in the action against Defendant to recover for loss of consortium.

Defendant moves for an order granting summary judgment in her favor and dismissing the Complaint.

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

In order to recover for injuries caused by a dog bite under strict liability, the plaintiff must establish that the dog had vicious propensities of which the owner knew or should have known about (*see Collier v Zambito*, 1 NY3d 444, 446 [2004]; *Bukhtiyarova v Cohen*, 172 AD3d 1153, 1154 [2d Dept 2019]; *Jacobsen v Schwarz*, 50 AD3d 964, 965 [2d Dept 2008]). "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" (*Bukhtiyarova*, 172 AD3d at 1154, quoting *Collier*, 1 NY3d at 446; *see Costanza v Scarlata*, 188 AD3d 1145, 1146 [2d Dept 2020]). An owner's knowledge of vicious propensities may be established by proof of similar prior acts of which the owner had

notice (*see Collier*, 1 NY3d at 446.). “It is not necessary to prove a prior bite” (*Jacobsen*, 50 AD3d at 965).

“[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 someone—by evidence that it had been known to growl, snap or bare its teeth [. . .] whether the owner chose to restrain the dog, and the manner in which the dog was restrained [. . .] or [t]he keeping of a dog as a guard dog” (*Collier*, 1 NY3d at 447). An animal may be found to have vicious propensities where its behavior, although not dangerous or ferocious, reflects a proclivity to act in a way that puts others at risk of harm where such proclivity results in the injury giving rise to the lawsuit (*id.*).

“When harm is caused by a domestic animal, its owner’s liability is determined *solely* by application of the rule articulated in *Collier*” (*Bard v Jahnke*, 6 NY3d 592, 599 [2006] [emphasis added]; *see Bloomer v Shauger*, 21 NY3d 917, 918 [2013]; *Sooji Kim v Hong*, 143 AD3d 804, 805 [2d Dept 2016]; *Egan v Hom*, 74 AD3d 1133, 1134 [2d Dept 2010] quoting *Petrone v Fernandez*, 12 NY3d 546, 550 [2d Dept 2009]; *Feit v Wehrli*, 67 AD3d 729, 730 [2d Dept 2009]). “New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal” (*Sooji Kim*, 143 AD3d at 805; *see King v Hoffman*, 178 AD3d 906, 908 [2d Dept 2019]).

As a preliminary matter, the Court notes that Plaintiff’s First Cause of Action appears to allege several theories of liability against Defendant, including negligence per se for violation of New York City Department of Parks & Recreation Rules and Regulations §1-04(i) (56 RCNY § 1-04[i]); strict liability, and common law negligence.

The Court notes that 56 RCNY § 1-04 (i) does not create a private right of action for potential plaintiffs (*see* 56 RCNY § 1-07 [a]). Therefore, Plaintiff’s claim of negligence per se is dismissed.

Additionally, Plaintiff alleges common law negligence which is not a recognized theory of liability in a dog bite case in New York State (*see Bard*, 6 NY3d at 599; *Sooji Kim*, 143 AD3d at 805). As such, Plaintiff’s claim of common law negligence is dismissed.

Therefore, the Court turns to Plaintiff’s claim of strict liability.

In support, Defendant submits, among other things, her affidavit (EF Doc 23), a transcript of her Examination Before Trial (“EBT”) (EF Doc 21)¹ and the EBT transcript of Joy (EF Doc 19).

Joy testified that on November 8, 2019, he was working as a groundskeeper at the Central Park Conservancy. Joy attested that at approximately 9:45 a.m., he had finished blowing leaves off the 59th Street pathway and was standing on the side of his work cart when he heard a scream and felt a dog come up behind him and bite him, causing Joy to fall onto his back on the cement

¹ The Court notes that EF Doc 21 is blurry and difficult to read; however, Plaintiff submitted Defendant’s EBT transcript in opposition which was legible. As such, the Court reads from EF Doc 29.

below. Joy stated that the dog bit him on the inside of his left forearm. Joy testified that the dog was on a leash, but that the dog had gotten away from its owner.

Defendant testified that on November 8, 2019, she was walking her 60-pound pitbull, Juju, near the 59th Street Pathway in Central Park. Defendant stated that prior to the incident, she heard the sound of leaf blowers, but did not see any running. Defendant testified that while attempting to pass Joy and his work cart, Juju lunged at Joy and bit him.

Defendant attested that she often uses a prong collar when taking Juju for a walk. Defendant testified that a prong collar tightens around the dog's neck and allows the owner more control over the animal. Defendant stated that she used a similar collar with her prior dog because these collars are helpful for strong dogs. Defendant attested that she only uses the prong collar when she takes Juju for walks, not in her home.

Defendant testified that Juju does not like loud noises like leaf blowers or lawnmowers and typically barks and pulls on his leash when he hears them. Defendant stated that Juju occasionally rears up on his hind legs in response to motorcycles. Defendant testified that when she pulls back on his leash and yells, "No," while Juju is barking, he typically continues barking and pulling on his leash.

Defendant avers that Juju has never lunged at other animals, risen on his hind legs to greet people, growled at any person, bared his teeth, bitten anyone, been trained as a guard dog, or exhibited any other behavior that might indicate any vicious propensities. Defendant further avers that she has never received any oral or written complaints about Juju.

Therefore, Defendant establishes prima facie entitlement to summary judgment on Plaintiff's strict liability claim. Thus, Plaintiff must raise a triable issue of fact as to Defendant's knowledge of Juju's alleged vicious propensities.

In opposition, Plaintiff submits, among other things, an article entitled, "To Pinch or Not To Pinch Collar? Pros, Cons & How to Use (EF Doc 30), an article entitled, "What Are the Dangers of Using Choke and Prong Collars?" (EF Doc 31), and the Affirmation of Joshua Fogel ("Fogel"), attorney for Plaintiff (EF Doc 27)².

In reply, Defendant argues that the articles submitted are not in admissible form. The Court agrees. Plaintiff fails to set forth any foundation upon which these articles would be admissible. Therefore, the Court does not consider them.

Fogel argues that Defendant's violation of 56 RCNY § 1-04 is some evidence of negligence. This argument is unavailing as common law negligence is not a basis for imposing liability for a dog bite in New York (*see Petrone v Fernandez*, 12 NY3d 546, 550 [2009]). Fogel further argues that Defendant's use of a prong collar and Juju's tendency to pull on his leash and stand up on his hind legs when confronted with loud noises is proof of his vicious propensities;

² An attorney's affirmation that is not based upon personal knowledge is without evidentiary value (*see Zuckerman v Cit of New York*, 49 NY2d 557, 563 [1980]); however, this Court will consider the legal arguments contained therein.

however, this, too, is unavailing. Where the court has noted a defendant's use of pinch or prong collars, other factors were present to establish the defendant's knowledge of the dog's vicious propensities (*see Coon v Holmes*, 253 AD2d 731, 731 [2d Dept 1998]; *Grimes v Latimer*, 75 Misc3d 1227(A) [Sup Ct Westchester Cty 2022]). Further, the behavior highlighted by Fogel, pulling on a leash or rearing up on hind legs due to loud noises, is not in itself indicative of threatening or menacing tendencies or outside the realm of normal canine behavior (*see Collier*, 1 NY3d at 447; *Bukhtyarova*, 172 AD3d at 1155).

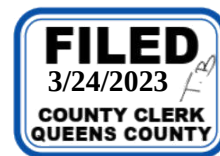
Plaintiff fails to set forth any relevant factors which might raise a triable issue of fact as to Juju's purported violent propensities. Therefore, Defendant's motion is granted.

In accordance with the foregoing, it is hereby **ORDERED** that Defendant's motion for summary judgment is granted; and it is further

ORDERED that the Complaint is dismissed with prejudice; and it is further

ORDERED that Defendant shall serve a copy of this Order with Notice of Entry upon Plaintiffs within twenty (20) days of entry of this Order.

This constitutes the Decision and Order of the Court.



3/22/2023

DATE

Phillip Hom
PHILLIP HOM, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE