Carilli v Bell
2024 NY Slip Op 35185(U)
February 29, 2024
Supreme Court, Richmond County
Docket Number: Index No. 151001/2022
Judge: Wayne M. Ozzi
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At an IAS Part 23 of the Supreme Court of the State of New York, held in and for the County of Richmond at 26 Central Avenue, Staten Island, New York 10301 on the 29th day of FEBRUARY 2024

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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RICKY A. CARILLI, SR. and SUSAN CARILLI,
Plaintiffs,

-against-

Decision and Order
Index No.: 151001/2022
Motion Seq Nos. 001, 002

THOMAS M. BELL,

URSULA BELL and ROBERT BELL,
Defendants.

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PRESENT: Hon Wayne M. Ozzi, JSC

The following papers were read and considered by the Court on the aforementioned motions submitted to the Court on February 22, 2024: NYSCEF Doc No. 47-63

Defendants all move for summary judgment dismissing the complaint against them in this case, which involves a dog bite. The dog in question, "Max," was owned by Defendant Thomas Bell, and the incident occurred while the dog was being cared for by Defendant's parents, Defendants Ursula Bell and Robert Bell at their home. For the reasons provided below, the motions are granted and the complaint is dismissed.

BACKGROUND

By way of brief background, the Plaintiff in this case was a newspaper delivery person who delivered the Advance newspaper daily to Defendants Ursula and Robert Bell. Defendants all indicate that, at the time the incident occurred, Defendants Ursula and Robert Bell had been caring for "Max," the dog owned by their son Defendant Thomas for several days while he was out-of- state.

On the morning of the incident, Plaintiff testified that he left the paper by the door as usual. He explained that the policy of the Advance was that the paper had to be left near the door, so Plaintiff would exit his car and throw or place the paper toward to the door. On the day

in question, he testified that he tossed the paper by the front door and started walking from the property. He took maybe five steps when he heard the screen door open. Expecting to see the homeowner there, Plaintiff turned around to say hello. He saw the male homeowner and the dog inside the home. The dog then came out of the door and charged him. He testified that, in seconds, the dog bit him breaking the skin on the top of his arm. Plaintiff punched the dog twice to get him to release his grip. Plaintiff backed up a few steps to get out of the area, and fell down. He indicated he was "out cold" and then saw a man kneeling next to him. Plaintiff was transported to the hospital by an ambulance after the incident. Thomas Bell testified that he was about to give Plaintiff a monetary "tip" for the delivery and was about 15 feet from the storm door, when Max pushed open the storm door and got out. He did not realize that something had happened until he went outside and saw Plaintiff on the ground with his head bleeding.

According to the testimony and averments[1] of the Defendants, "Max" weighed 95 pounds and was about eight years old. Thomas Bell had owned Max for roughly six years at the time of the accident. All of the testimony was that Max had never bitten any person or dog, and had never shown violent propensities. Robert indicated that the dog would bark when he heard the doorbell and might jump on people he knew at times in play, but never jumped on visitors he did not know. Robert testified that Max did not jump at the door nor did he growl. Robert testified that, at his house, they would keep Max away from the door when people came, as he barked and got a bit excited. He further testified that he did this only because the barking might make people nervous.

ANALYSIS

The Court grants the motions (Motion Seq. No. 001, 002) for summary judgment as there are no disputed issues of material fact that would require a trial in this case.

A party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, setting forth sufficient evidence to demonstrate the absence of any material issues of fact. *(Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 853 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980)).* Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *(Winegrad, supra, 64 NY2d at 853).*

Summary judgment should be denied where there is any doubt, at least any significant doubt, whether there is a material, triable issue of fact. *(Phillips v. Joseph Kantor & Company, 31 N.Y.2d 307, 311 (1972)).* Relatedly, the Court notes that summary judgment is inappropriate where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility. *(Scott v. Long Is. Power Auth., 294 AD2d 348 (2d Dept. 2002); see Baker v. D.J. Stapleton, Inc., 43 AD3d 839 (2d Dept. 2007)).* The Court's function on

[1]Defendant Ursula Bell was not deposed but instead provided an affidavit regarding the incident.

a summary judgment motion is "to determine whether material factual issues exist, not to resolve such issues." *(Ruiz v. Griffin, 71 AD3d 1112, 1115 (2d Dept. 2010), citing Lopez v. Beltre, 59 AD3d 683, 685 (2d Dept. 2009); see Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 (1957); Miele v. American Tobacco Co., 2 AD3d 799, 803 (2d Dept. 2003)(issue finding, not issue determination)).* However, where there is no issue of genuine fact to be resolved at a trial, courts should not be reluctant to decide the matter summarily. *(Andre v. Pomeroy, 35 NY 2d 361 (1974)).*

Turning to the claims in this case, the Court notes that dog bite injuries are treated differently than other personal injury claims. The sole means of recovery of damages for injuries caused by a dog bite or attack is upon a theory of strict liability, whereby "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." *(Bukhtiyarova v. Cohen, 172 A.D.3d 1153, 1154 (2d Dept. 2019).* Strict liability can also be imposed against a person other than the owner of an animal which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensity. *(see Matthew H. v. County of Nassau, 131 A.D.3d 135 (2d Dept. 2015); Dufour v. Brown, 66 A.D.3d 1217, 1218 (3d Dept. 2009)).*

The Court finds that summary judgment is appropriate in this case. The Defendants argue that the dog did not have vicious propensities, that no such propensities were known to them, and that same is borne out by the evidence. Therefore, they argue that they are entitled to summary judgment. Plaintiff's arguments -- that the dog was large in size and barked – are not sufficient to establish vicious propensities about which the owner knew or should have known. Plaintiff also points to the fact that Defendant Thomas also testified that the dog was kept from the door when visitors arrived due to his tendency to bark. However, Defendant explained that he did this not because the dog would approach the visitors but because barking made some people nervous.

More specifically, the salient case law provides that "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 v. Zambito, 1 N.Y.3d at 446[internal quotation marks omitted]).* "Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl or snap or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm." *(Ioveno v. Schwartz, 139 A.D.3d 1012, 1012 (2d Dept. 2016).* As stated by the Court of Appeals in *Collier*, barking and running around are normal canine behavior and do not constitute vicious propensities. *(Collier v. Zambito, 1 N.Y.3d at 446–47).* *Collier* further concludes that 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 when such proclivity results in the injury giving rise to the lawsuit. *(Collier, 1 N.Y.3d at 447).*

Summary judgment is appropriate as none of the conduct pointed out by Plaintiff rises to the level of vicious propensities that the owner or the caretaker defendants knew or should have known about. Here, there is no evidence that the dog ever bit or injured someone, no evidence that he ever acted aggressively or had violent or aggressive tendencies. There also is no evidence that the owner or caretaker defendants knew of any vicious propensities or should have. The testimony showed only that the dog at times barked and got excited, and at times jumped on people that he knew out of friendliness and excitement, but never jumped on strangers. These do not constitute vicious tendencies under the case law discussed above.

Similarly, there is no question that these behaviors do not fit within the rubric of a "proclivity to act in a way that puts others at risk of harm" if such proclivity results in the injury giving rise to the lawsuit. There is no claim and no issue of disputed fact demonstrating a known tendency to jump resulted in the injury giving rise to the lawsuit. *(Collier v. Zambito, 1 N.Y.3d at 447).* For this reason, the First Department case cited by the Plaintiff, *Anderson v. Carduner, 279 A.D.2d 369 (1st Dept 2001)*, is inapposite. That case provides in part that a "known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors," will be enough to make the defendant liable for damages resulting from such an act. *(Anderson v. Carduner, 279 A.D.2d 369, 369 (1st Dept 2001)).* There is no question but that injuries here did not result from any alleged jumping gone awry – plaintiff testified that the dog charged and bit him on the arm within seconds. *Anderson* in contrast involved a dog known to "rise up" on visitors, who allegedly injured plaintiff by doing just that – jumping on her and injuring her eye with his snout. *Anderson* also does not apply because the conduct described in that case is different than the conduct the Defendant-owner described – he stated that the dog at times playfully jumped on people he knew out of friendliness and excitement, but never jumped on visitors.

Accordingly, it is hereby

ORDERED that Defendants' motions for Summary Judgment are hereby granted; and it is further

ORDERED that the Complaint in this matter is hereby dismissed.

DATED: February 29 , 2024

ENTER:

Hon. Wayne M. Ozzi, JSC