

Casabona v Sunrise Senior Living Servs., Inc.
2024 NY Slip Op 35678(U)
September 3, 2024
Supreme Court, Nassau County
Docket Number: Index No. 601755/2021
Judge: Thomas Rademaker
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 12**

PRESENT: HON. THOMAS RADEMAKER

X

MICHAEL CASABONA and LISA CASABONA,

Plaintiff,

Index No.: 601755/2021

Mot. Seq. 002

Submitted: 8/27/2024

-against-

DECISION AND ORDER

**SUNRISE SENIOR LIVING SERVICES, INC.
and SUNRISE SENIOR LIVING
MANAGEMENT, INC.,**

Defendants

X

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, including e-filed documents/exhibits numbered 83 – 101; and 106 -- 115, this motion is decided as follows:

The Defendant moves the Court by Notice of Motion for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of defendants.; SUNRISE SENIOR LIVING SERVICES, INC. AND SUNRISE SENIOR LIVING MANAGEMENT, INC (“Defendant”)¹ and dismissing Plaintiffs’ Complaint.

This action arises from a tripping incident which occurred on September 18, 2020, in which the Plaintiff Michael Casabona (“Plaintiff”) tripped over a dog named “Nina” that lived at the Sunrise of Dix Hills, an assisted living community, when visiting his mother at that facility. The

¹ The Plaintiff withdrew his action against Sunrise Senior Living Services, which the Plaintiff acknowledged did not owner, operate or manage the subject premises, but continues his common law negligence and his wife’s loss of consortium claims against Sunrise Senior Living Management, Inc.

Plaintiff contends that the Defendants created a defective, dangerous, or hazardous condition when permitting the dog to remain unrestrained and unbarricaded inside the Sunrise of Dix Hills premises. The Complaint consist of the Plaintiff's claims of negligence and public and private nuisance, along with his spouse's claim of loss of consortium. The Plaintiff withdrew his claims of public and private nuisance in his opposition to summary judgment but continues his common law negligence and his spouse's loss of consortium claims.

The Plaintiff initiated the matter at bar through the filing of a Summons and Complaint on February 12, 2021, and issue was joined when the Defendants filed their answers on May 13, 2021. A Preliminary Conference was held on February 11, 2022, and the Plaintiff was permitted to amend his Complaint on March 29, 2022., with the Defendants filing their answers on April 18, 2022. After joinder of issue was complete, the discovery process commenced, and the case was certified ready for trial through the Court's Order dated May 15, 2023 ("Certification Order"). The certification of the matter was ready for trial without prejudice to the motion practice engaged in by the parties related to the determination of the discoverability of certain documents which were subject to the Defendants' claim of qualified privilege and in consideration of this dispute, the Court permitted the extension of the deadline to file Note of Issue. The Note of Issue was filed on March 1, 2024, and the Defendants' summary judgment motion was filed within the time frame specified in the Court's Certification Order.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez*

V. Prospect Hospital, 68 NY2d 320 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). In a summary judgment motion that seeks the dismissal of a personal injury action the court must give the plaintiff the benefit of every favorable inference which can reasonably be drawn from the evidence (*see Anderson v. Bee Line*, 1 N Y 2d 169 [1956]). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992], and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 NY2d 361 [1974]).

The Defendant argues that Plaintiff was injured when he tripped over a dog in a hallway at an assisted living facility and contends that the strict liability's traditional status as the predominant theory of recovery for injuries caused by a domestic animal logically forecloses recovery under a theory of negligence. (*Doerr v Goldsmith*, 25 NY3d 1114, 1122 [2015]). Generally, New York law does not recognize a common law negligence cause of action to recover damages related to injuries caused by a domestic animal. (*Xin Kai Li v. Miller*, 150 A.D.3d 1051, 1051 [2d Dept 2017]). The Court of Appeals has limited landowner liability for animal related injuries to those which involve animals that have demonstrated vicious propensities, and in certain limited circumstances, such as incidents involving farm animals and incidents which occurred in veterinarian offices. (*Hastings v Sauve*, 21 NY3d 122, 125-126 [2013] [negligence action allowed in accident between bicyclist and a stray cow]; *Hewitt v. Palmer Veterinary Clinic, PC*, 35 N.Y.3d

541, 548-549 [2020] [negligence action permitted against veterinarian office in waiting room animal bite case]).

The Court has only expanded liability to owners of domesticated animals to those instances in which the animal has “known vicious propensities” for which there is strict liability in tort. The Courts have not allowed for the consideration of the defendant’s conduct, as opposed to the dog’s conduct, to be considered the cause of injury. (Scavetta v Wechsler, 149 AD3d 202, 210 [1st Dept 2017]) When harm is caused by a domestic animal, its owner’s liability is determined solely by the rule of strict liability applicable when the owner knows or should have known of the animal’s vicious propensities. For example, a defendant’s violation of the leash law was irrelevant because such a violation constituted only some evidence of negligence, and negligence was not a basis for imposing liability. (Petrone v Fernandez, 12 NY3d 546, 547 [2009]) Similarly, a dog owner is not required as a matter of law to confine a dog to any specific portion of a home, or to maintain the dog on a leash. (Fedick v. Fenton, 166 Misc. 707 [Sup Ct, Kings County 1938], *aff’d* 254 A.D. 704 [2d Dept 1938])

In contrast, the Plaintiff contends that his injury was not caused by his interaction with the dog, *per se*, but rather was a consequence of the Defendant’s failure to permit the dog to become a tripping hazard at the Defendant’s assisted living facility. A landowner must act as a reasonable person in maintaining their property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk (Basso v Miller, 40 NY2d 233, 235 [1976]). A landowner is under a duty to maintain their property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature, and the burden of avoiding the risk (Giulini v. Union free School Dist. # 1, 70 AD3d 632 [2d Dept. 2010]).

“To impose liability upon a defendant landowner for a plaintiff’s injuries, there must be evidence showing the existence of a dangerous or defective condition, and that the defendant either created the condition or had actual or constructive notice of it and failed to remedy it within a reasonable time” (*Morrison v. Apolistic Faith Mission of Portland*, 111 AD3d 684 [2d Dept 2013]; see *Winder v. Executive Cleaning Servs., LLC*, 91 AD3d 865 [2d Dept 2012]; *Gonzalez v. Natick N.Y. Freeport Realty Corp.*, 91 AD3d 597 [2d Dept 2012]).

The Courts have recognized negligence actions in cases involving injuries caused under certain circumstances, as when the owner of a farm animal “may be liable under ordinary tort-law principles” when that farm animal is allowed to stray from the property on which it is kept (*Hastings v Sauve*, 21 NY3d 122, 125-126 [2013]). Similarly, a veterinarian who introduces an animal to a crowded waiting room may also be held liable under common law negligence theories for animal created injury, as a veterinarian is in the business of treating animals and has “specialized knowledge and experience concerning animal behavior—who, in turn, may be aware of, or may create, stressors giving rise to a substantial risk of aggressive behavior. With this knowledge, veterinary clinics are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices—an environment over which they have substantial control, and which potentially may be designed to mitigate this risk” (*Hewitt v. Palmer Veterinary Clinic, PC*, 35 N.Y.3d 541, 548-549 [2020])

However, even with respect to incidents involving large farm animals, the Court of Appeals rejected a plaintiff’s common law action for negligence when a carpenter, working on a farmer’s barn, was injured by a bull who was unrestrained and used for breeding purposes. The Court declined to “dilute [the] traditional rule [of strict liability] under the guise of a companion common-law cause of action for negligence. In sum, when harm is caused by a domestic animal,

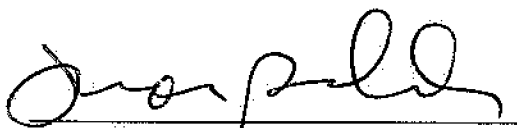
its owner's liability is determined solely by application of the rule articulated in *Collier*.” (*Bard v Jahnke*, 6 NY3d 592, 599 [2006] citing to *Collier v. Zambito*, 1 NY3d 444[2004] [“[N]othing in our case law suggests that the mere fact that a dog was kept enclosed or chained or that a dog previously barked at people is sufficient to raise a triable issue of fact as to whether it had vicious propensities,” *Collier* 1 NY3d at 447]).

Accordingly, upon a careful review of the papers submitted both in support of and in opposition to the Plaintiff's motion, and upon review of the controlling precedents, the Defendant's motion for summary judgment is **GRANTED** in its entirety, and it is hereby

ORDERED, that the Plaintiff's Complaint is **DISMISSED** with prejudice and in its entirety.

This constitutes the Decision and Order of the Court.

Dated: September 3, 2024
Mineola, N.Y.



Hon. Thomas Rademaker, J. S. C.

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ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE