Saks v Rosenstein
2025 NY Slip Op 35379(U)
January 13, 2025
Supreme Court, Westchester County
Docket Number: Index No. 63093/2022
Judge: Janet C. Malone
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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ABIGAIL SAKS,

Plaintiff,

-against-

STEVE ROSENSTEIN,

Defendant.

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Index No. 63093/2022

DECISION AND ORDER

Mot. Seq. Nos. 1, 2

MALONE, J.

In this personal injury action resulting from a dog bite, there are two motions before the Court for decision: Defendant's motion for an Order granting him summary judgment against Plaintiff on the ground that Defendant's dog was not known to have any vicious propensities, and Plaintiff's cross-motion for an Order granting leave to amend the complaint to add Defendant's wife Jane McGuiness ("McGuiness") as a party defendant and to file a supplemental summons and amended complaint (NYSCEF Doc. No. 43).

Defendant's motion is supported by the Affirmations of Megan Brady, Esq. and Exhibits A-D (NYSCEF Doc. Nos. 27-33, 45); and Plaintiff's opposition and cross-motion to Defendant's motion is supported by the Affirmation of Matthew Martin, Esq. and Exhibits 1-5, (NYSCEF Doc. Nos. 37-43).

The motions are combined for purposes of this decision and upon review and consideration of the case file, the foregoing NYSCEF documents inclusive of deposition testimony, Defendant's motion for summary judgment is DENIED and Plaintiff's motion for leave to amend the complaint is GRANTED without opposition as follows:

Party Contentions

Defendant and McGuiness (collectively "the Rosensteins") have an adult daughter Tessa and are the dog parents to two Rhodesian Ridgebacks named Rafi and Aidan. Warren Saks ("Warren") is the father of Plaintiff; and he and his wife have known the Rosensteins for more

than thirty years with their daughters being friends for decades (NYSCEF Doc. No. 40 at 14:12-18; Doc. No. 42, ¶6) despite Plaintiff's relocation to the United Kingdom.

When Plaintiff would visit the Rosensteins' home she interacted with Rafi, who she considered to be "big, intense, and hyperactive but not maliciously aggressive" (*see* NYSCEF Doc. No. 31 at 21:21-22:13; 22:19-23; s*ee also* NYSCEF Doc. No. 40 at 54:25-17).

On July 16, 2022, while Warren was driving Plaintiff to the Rosensteins' home for Plaintiff and Tessa to go shopping, he warned Plaintiff that the last time he was at the Rosensteins' Rafi had been extremely aggressive and locked away unlike the other dog Aidan (NYSCEF Doc. No. 31 at 21:15-22:13; NYSCEF Doc. No. 42, at ¶ 8). Warren also told Plaintiff that McGuiness told him that Rafi had bitten someone in town and that Tessa said that Rafi had to be driven around in the car because it was the only way he could be "socialized" (NYSCEF Doc. No. 31 at 79:9-81:15).

Upon returning to the Rosensteins' house after shopping, Plaintiff and Tessa waited outside the house while McGuiness brought Rafi and Aidan into the house to feed them (NYSCEF Doc. No. 41 at 57:6-25). Rafi and Aidan were wearing "choke chains", however, Rafi was leashed, and Aidan was unleashed. While in the kitchen, Plaintiff took part in the "hot dog ritual" where "strangers, visitors, guests of the house, [and] people in general" would give Rafi hotdogs so that he would not be too aggressive. The ritual was performed with Plaintiff because Rafi had never really met Plaintiff (NYSCEF Doc. No. 40 at 62:2-21).

As part of the ritual, McGuiness told Plaintiff to continue giving Rafi hotdog pieces. When Plaintiff went to give Rafi a piece of hotdog, Rafi leaped up and bit Plaintiff's nose while McGuiness was still holding Rafi's leash. Rafi did not bark or growl or give Plaintiff any warning or sign that he was going to bite her (NYSCEF Doc. No. 31 at 35:19-43:20).

McGuiness put Rafi in his crate and Tessa took Plaintiff to the hospital (NYSCEF Doc. No. 41: 53:4-13) where Plaintiff received reconstructive plastic surgery and over thirty stitches to her nose (NYSCEF Doc. No. 31 at 54:4-21).

Defendant was in another room when Plaintiff was bitten, (NYSCEF Doc. No. 32 at 71:9-16), however, he testified Rafi was well behaved, that Rafi went for the hotdog and Plaintiff's nose was in the way; there was no growling, no lunging, nothing; Plaintiff's nose was between the line of vision from Rafi to the hotdog (NYSCEF Doc. No 32 at 72:6-19).

Defendant is clear he never knew Rafi as having vicious propensities. Defendant testified that he never heard Rafi bark at anybody; he never experienced any behavioral issues with Rafi,

and Rafi was never administered any behavioral or temperament medications (NYSCEF Doc. No. 32 at 150:10-13; 125:17-126:7).

McGuiness testified[1] that Ridgebacks are big, they have big feet, and they jump to say hello by bumping your nose, what McGuiness called "nose bonks" (NYSCEF Doc. No. 40 at 62:2-63:5), but Rafi did not often nose bonk (NYSCEF Doc. No. 40 at 66:5-17). McGuiness also testified that when Plaintiff and Warren first arrived on July 16, 2022, Rafi was barking aggressively, which was unusual for Rafi (NYSCEF Doc. No. 40 at 80:23-81:8; 82:4).

Warren claims it is "categorically false" that Rafi was not aggressive (NYSCEF Doc. 42, ¶ 5); that from the time Rafi was brought home by the Rosensteins, he was uncontrollably aggressive and such was known to Defendant and McGuiness. Warren warned McGuiness that Rhodesian Ridgebacks were not a good choice as a family pet because they were not the cuddly "couch potato" type of dog. (NYSCEF Doc. No. 42, ¶¶ *6-7)*

Warren testified that on one occasion when he outside the Rosensteins' home , Rafi charged at Warren, jumped on his back, twisted him around and jumped up to his the eye-level of his six feet two inches frame, and aggressively and viciously snapped at him. When Warren tried to fend Rafi off with his knee and arm, Rafi snapped and clawed at Warren's arm, causing bleeding to his arm. Warren told Defendant and McGuiness what occurred and showed them his bleeding arm. (NYSCEF Doc. No. 42 ¶¶ 8-9)

Prior to the foregoing incident, McGuiness recounted to Warren that when she was walking Rafi he lunged at an older woman, and that McGuiness was scared that Rafi had broken the woman's skin. Out of fear that Rafi would do the same kind of thing again, McGuiness took to driving Rafi around town in her car so that he could see people and hopefully become better socialized, but McGuiness's efforts failed, so it became customary that Rafi be confined to his crate or closed in a room by Defendant and McGuiness whenever Warren or other people visited the Rosensteins' home. (NYSCEF Doc. No. 42 ¶ 9).

Leave to Amend Pleadings

"Leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend " *Kruger v EMFT, LLC*, 87 AD3d

[1]McGuiness was not represented by counsel at her deposition (NYSCEF Doc. No. 40 at 18-20).

717, 718 (2d Dept 2011). "A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed" *Thomson v. Watchtower Bible Tract Socy. Of NY, Inc*., 198 AD 3d 996, 997-998 (2d Dept. 2021). "The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion" *Oppedisano v D'Agostino*, 196 AD3d 497, 498 (2d Dept 2021) (internal citations omitted).

Here, Plaintiff seeks to amend the Complaint solely to add McGuiness to the caption as a party defendant and to allege the first and only cause of action already plead against Defendant, also against McGuiness (NYSCEF Doc. No.43).

As there appears to be no opposition to amending the Complaint, Plaintiff's motion is granted.

Summary Judgment

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this [*prima facie*] burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (*Vega v Restani Constr. Corp.,* 18 NY3d 499, 503 [2012], *quoting Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]).

As the proponent of its summary judgment motion, Defendant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact." *Winegrad v. New York University Medical Center,* 64 N.Y.S.2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 N.Y.S.2d 557, 562 (1980); *see also* CPLR § 3212. The parties' competing contentions must be viewed in a light most favorable to the non-moving party. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763, 27 N.Y.S.3d 468 (2016). If the moving party meets its burden, the burden shifts to the non-moving party to establish, through admissible evidence, the existence of disputed issues of material fact for trial. *Zuckerman v. New York*, 49 N.Y.2d 557, 560, 427 N.Y.S.2d 595 (1980). The non-moving party must produce evidence in the record and may not rely on conclusory statements or contentions. *Id*. Instead, the opponent of a motion must lay bare affirmative proof sufficient to establish that real defenses exist calling for a trial.

On a motion for summary judgment the Court is not to decide credibility, but whether there exists a factual issue. *S.J. Capelin Associates v Globe Mfg. Corp*., 34 N.Y.2d 338, 341, 313 N.E.2d 776, 357 N.Y.S.2d 478 (1974). The court's function, when dealing with summary judgment motions, is issue finding rather than issue determination. *See Sillman v. Twentieth Century-Fox Film Corp.,* 3 N.Y.2d 395, 144 N.E.2d 387 (1957). The evidence will be construed in the light most favorable to the non-moving party "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied." *Daliendo v. Johnson,* 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). However, the Court must also decide whether the factual issues presented are genuine or unsubstantiated. *Prunty v. Keltie's Bum Steer*, 163 A.D.2d 595, 596 (2d Dept. 1990). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted. *Id.* citing *Glick & Dolleck v. Tri-Pac Export Corp*., 22 N.Y.2d 439 (1968).

"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)(internal quotation marks and citations omitted); *see also Doerr v. Goldsmith*, 25 N.Y.3d 1114, 1116 (2015).

In New York State, it is well-settled that an owner of a domestic animal that causes personal injuries is not liable for those injuries unless the vicious propensities of the animal are known to him or her. *See Id.* citing *Bard v Jahnke*, 6 NY3d 592 (2006) ("The rule . . . that when harm is caused by a domestic animal, its owner's liability is determined solely by the vicious propensity rule. . ."; *Collier v Zambito*, 1 NY3d 444, 446-447 (2004) ("We made clear that by vicious propensities we meant any behavior that reflects a proclivity to act in a way that puts others at risk of harm . . . "In addition, 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") (internal quotation marks and citations are omitted).

As the testimony establishes a triable issue of fact as to whether Rafi had a vicious propensity known to the Rosensteins, Defendant's motion for summary judgment is denied.

To the extent relief requested is not addressed, it is deemed denied.

Accordingly, it is hereby

ORDERED, that Defendant's motion (Seq. No. 1) for summary judgment is denied; and it is further

ORDERED, that Plaintiff's cross-motion (Seq. No. 2) to amend the Complaint to add Jane McGuiness as a party defendant is granted and the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

ABIGAIL SAKS,

Plaintiff,

-against-

Index No. 63093/2022

STEVE ROSENSTEIN and JANE MCGUINESS,

Defendants.

----------X

and it is further

ORDERED, that Plaintiff's Supplemental Summons and Amended Complaint (NYSCEF Doc. No. 43) are deemed filed and served; and it is further

ORDERED, that Defendant Jane McGuiness may file an answer to the Amended Complaint no later than **Friday, February 7, 2025;** and it is further

ORDERED, that uploading this Decision and Motion to NYSCEF shall be deemed sufficient service on the parties; and it is further

ORDERED that the parties shall file a Preliminary Conference Stipulation found at west-general-civil-preliminary-conf-stip-form.pdf no later than **Friday, February 21, 2025, or** appear for an in person Preliminary Conference **March 3, 2025 at 9:30am in Courtroom 1401** before the Hon. Janet C. Malone, J.S.C. at the Westchester County Supreme Court located at 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
January 13, 2025

ENTER:

Janet C. Malone.

HON. JANET C. MALONE, J. S. C.