Van Leer v Incalcatera
2013 NY Slip Op 31798(U)
August 1, 2013
Sup Ct, Suffolk County
Docket Number: 10-46420
Judge: Arthur G. Pitts
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SHOR™ FORM ORDER

INDEX No. 10-46420
CAL. No. 12-01535OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 1-10-13
ADJ. DATE 4-11-13
Mot. Seq. # 002 - MG; CASEDISP

COPY

PATRICIA VAN LEER,

Plaintiff,

- against -

JOSEPH P. INCALCATERA,

Defendant.

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Bay Shore, New York 11706

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Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 9; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 10-12; Replying Affidavits and supporting papers 13-14; Other 15-19 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant, Joseph P. Incalcatera, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that he bears no liability for the plaintiff's fall is granted with prejudice.

In this negligence action, the plaintiff seeks damages for personal injuries arising out of an incident on June 27, 2010 on the beach at Democrat Point, Fire Island, New York. A dog allegedly owned by the plaintiff's friend, defendant Joseph P. Incalcatera, bumped into her leg causing her to fall and allegedly hurting her knee. Causes of action sounding in negligence and strict liability have been pleaded.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the

opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]).

The defendant seeks summary judgment dismissing the complaint on the basis that his dog, Shea, and the plaintiff's dog, Yellow Finn, had been playing together for about five to ten minutes as they had previously done on other occasions when the defendant's dog allegedly bumped her leg; that the dog has no vicious propensities and has not knocked anyone down previously; and that neither the defendant nor the plaintiff witnessed the defendant's dog bump into her leg. In support of this application, the defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, the plaintiff's unverified bill of particulars; and signed and certified transcripts of the examinations before trial of Joseph P. Incalcatera and Patricia Van Leer, both dated November 8, 2011, and non-party witness, Lauren Tooker, dated March 1, 20012.

Patricia Van Leer testified to the extent that on June 27, 2010 she was at the South Beach area on the bay side of Robert Moses, and arrived by boat with Bill Rauft at about 5:00 p.m. with Rauft's yellow lab, Yellow Finn. She exited the boat by jumping off about a foot and a half into the water. She had been there for about one half hour, walking with Yellow Finn, when Joseph Incalcatera and Lauren Tooker arrived with their dog Shea, a yellow lab, which she did not recall ever having seen before. She stated Rauft and Incalcatera worked together at White Water Marine, but prior to this date, she had never been in a social setting with Incalcatera, and only saw him if she stopped in at their work or perhaps the Christmas party. She had never been around when Shea and Yellow Finn played together, and was not aware that they had. From 2005 until June 27, 2010, she never socialized with Lauren Tooker, who also worked at White Water Marine. There came a point on that date that she saw Joe Incalcatera and his dog just west of her on the beach, headed in her direction, with Shea running in back, in front, and alongside of Incalcatera. When Incalcatera reached her, the incident had not yet occurred. She and Incalcatera said "hi" and "how are you to each other." Yellow Finn was to her right. She did not see the two dogs engage in any activity together, but then stated that they did play with each other, but she did not know how long until the incident occurred, but it may have been five or ten minutes. The dogs were running on the shoreline and in the water. She never saw the two dogs become violent with each other, and described their play as frolic. The dogs then took a break and went in somewhat separate directions. Just before the incident occurred, Shea was to her left where she was standing facing north in the water just above her ankles. Incalcatera was also to her left facing north, about a foot behind her. Yellow Finn was to her right on the shoreline. Shea charged her by running at her from "multiple rooms away" (about forty feet) running through the water in her direction. She turned to her right to see what her dog was doing, and Yellow Finn was just standing there in the water about fifteen to twenty feet away. She did not remember if her dog moved then. She turned and almost instantaneously was down as she was struck on the left side on the outside of her left leg by the yellow lab Shea. She did not see Shea strike her, but fell onto her right hip into the water and could not get up due to pain in her leg. She never told Joseph Incalcatera or Lauren Tooker that Shea knocked her over. Van Leer continued that Yellow Finn played with other dogs at least once a week, and while they were playing, she never used a leash on her. On the date of the accident, she did not ask the defendant to leash Shea, and she was not concerned that he was not leashed.

Joseph Incalcatera testified to the extent that he has two yellow labs, a thirteen year old and a two to three year old, whose names are Brittany and Shea, respectively. He testified that he has had dogs all his life; that his parents bred and trained dogs; and that he trained his own dogs who were either golden retrievers or yellow labs. He stated that Shea is the world's smallest yellow lab and weighs only about 30 to 35 pounds, and is about two feet tall. His dogs have never attacked anyone, and when he walks them, he does not need a leash for them. Incalcatera testified that he is a boat mechanic, and on June 27, 2010, he took his boat, his girlfriend, Lauren Tooker, and his two dogs, to Sexton Island beach. While en route home, he answered a service call for a boat stuck in the inlet. While he serviced the boat, the boat owner's children played with his two dogs. When he finished and was leaving to go home again, he spotted Billy Rauft, his friend, so they stopped at the beach at Democrat Point, and Sore Thumb, on the Robert Moses inlet, bay side. He tied his boat next to his friend Bill's boat. Bill was on the boat, and his girlfriend, Patricia Van Leer, was on the beach getting her shoes with her and Bill's yellow lab, Yellow Finn, about 400 feet from them. Incalcatera had previously met the plaintiff, had dinner with them, they came to his house, and he worked on their boat. They got Shea off the boat and she ran onto the beach to play with Yellow Finn as she had done "millions of times", then stated the dogs interacted a half dozen times previously running around, chasing each other. They never growled and neither was of a violent nature, just playful. Incalcatera testified that he was talking to Bill, and Pat was standing by the water with Yellow Finn a couple of feet from her. Shea ran towards them. Shortly thereafter, he heard Pat scream. He got off the boat and ran towards the scream. It took him about 30 to 45 seconds to reach Pat who was sitting in the water. She told him that her knee hurt. The two dogs were standing behind her. She told him she fell and her knee hurt. He did not recall her saying how she fell. He picked her up and carried her to Bill's boat. He described Shea as a playful, happy, scared of her own shadow dog, and that she loves to interact with other dogs. If she wants attention, she is not aggressive and doesn't knock anyone down, but sits right next to you, and whines to be petted. There were no signs on the beach prohibiting dogs. He never received any complaints from anyone because Shea was not on a leash. She never knocked anyone down. Bill never expressed that he did not want Shea and Yellow Finn to play together.

Lauren Tooker testified to the extent that she was in the vicinity when the accident occurred, as they saw Bill's boat and went to it by boat. She worked with Bill. The water was rough and "Joe" was trying to anchor it. They let Shea off the boat. She stated that she knew Patricia Van Leer for about five years as acquaintances. Van Leer was down the beach walking, so she waved and asked how Van Leer was. Shea sniffed the beach area for a little, and was in the vicinity of Van Leer and Finn, about two hundred feet from the boat. Van Leer was with Yellow Finn, who was about four and a half to five years old, and weighed about fifteen pounds more than Shea. Van Leer then turned around heading back towards them from about fifty feet away. When the dogs saw each other, they sniffed each other, but were not jumping up. Finn stayed to the left of Van Leer, and Shea veered off into the dunes, sniffing and moseying. Tooker testified that she did not see the incident, but heard a yell, an "ow", and saw Van Leer sitting on the ground on the beach at the water's edge with her feet facing towards the water. The dogs were sitting on either side of her, with Finn closer at her left side right next to her. Shea was off center a couple feet from Van Leer towards her back towards the dune side. Tooker testified that she never saw Shea jump on anyone, and only jumped when playing with a rope at work. When Van Leer was lifted into the boat, she did not indicate that she was knocked down by Shea and just said her leg pained. Tooker stated that Shea never did anything even remotely close to knocking someone over, so she could not say it was so. She later learned that Bill had called an ambulance as he could not get Van Leer out of the boat when they got back, and there was a police report filed. She never discussed the incident with Van Leer or Bill. The first she learned that Van Leer claimed that Shea knocked her over was when the

summons was delivered. She sent flowers to Van Leer and called her at the hospital, but Van Leer never indicated how she got hurt.

STRICT LIABILITY

To recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities (*see* ***Bard v Jahnke***, 6 NY3d 592, 815 NYS2d 16 [2006]; ***Collier v Zambito***, 1 NY3d 444, 448, 775 NYS2d 205 [2004]; ***Christian v Petco Animal Supplies Stores, Inc.***, 54 AD3d 707, 708, 863 NYS2d 756 [2d Dept 2008]; ***Claps v Animal Haven, Inc.***, 34 AD3d 715, 716, 825 NYS2d 125 [2d Dept 2006]; *see also* ***Palumbo v Nikirk***, 59 AD3d 691, 874 NYS2d 222 [2d Dept 2009]).

Knowledge of vicious propensities may be established by proof of a dog's attacks of a similar kind of which the owner had notice, or by a dog's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm (*see* ***Bard v Jahnke***, *supra*, citing ***Collier v Zambito***, *supra*). Factors to be considered in determining whether an owner has knowledge of a dog's vicious propensities include 1) evidence of a prior attack, 2) the dog's tendency to growl, snap, or bare its teeth, 3) the manner of the dog's restraint, 4) whether the animal is kept as a guard dog, and 5) a proclivity to act in a way that puts others at risk of harm (*see* ***Collier v Zambito***, *supra*; ***Galgano v Town of N. Hempstead***, 41 AD3d 536, 840 NYS2d 794 [2d Dept 2007]).

New York recognizes a cause of action which imposes strict liability (no proof of negligence necessary) upon owners for injuries inflicted by their vicious dogs, the owners having knowledge thereof and viciousness being defined as prior bites and/or mischievous propensities (***Nardi et al v Gonzalez,*** 165 Misc 2d 336 [City Ct, Yonkers 1995]). Knowledge of vicious propensities may be established by proof of a dog's attacks of a similar kind of which the owner had notice, or by a dog's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm (*see* ***Bard v Jahnke***, supra, citing ***Collier v Zambito***, *supra*).

With respect to the liability for a domestic animal, such as a dog, 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, (***Collier v Zambito***, *supra*). "The owner of a domestic animal who either knows or should have known of an animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. 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***, *supra*).

In ***Anderson v Carduner***, 279 AD2d 369, 720 NYS2d 18 [1st Dept 2001], the court vacated the lower court's dismissal of the complaint finding that whether the injury caused when the dog rose up on plaintiff was reasonably foreseeable based on past behavior of the dog was an issue of fact to be determined by the trier of fact. A known tendency to attack others, even in playfulness, as in the case of an 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.

In the case at bar, it has not been demonstrated that the defendant's dog Shea, a 30 to 35 pound yellow lab, had a propensity for dangerous or ferocious behavior, or had a proclivity to act in a way that put others at risk of harm by jumping on people or charging them, thus, entitling the defendant to summary judgment on this cause of action. Nor has it been established that defendant had prior knowledge of such activity or dangerous behavior which would put others at risk of harm. The plaintiff did not fear any risk of injury from Shea and did not request that the defendant keep Shea on a leash to stop her from jumping on her as Shea had not jumped on her or charged her prior to the plaintiff claiming the dog charged at her in the water, knocking her over. Thus, the plaintiff has not raised a factual issue to preclude summary judgment on the basis the defendant had prior notice of the particular conduct by Shea claimed in this matter (*see* ***Bannout v McDaniels***, 30 Misc3d 1215(A); 924 NYS2d 307 [Sup Ct, Kings County 2011]).

Accordingly, summary judgment is granted dismissing the cause of action premised upon strict liability.

COMMON LAW NEGLIGENCE

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup Ct Nassau County 2006]).

"Although the First and Second Departments of the Appellate Divisions of the Supreme Court of New York have allowed recovery for injury caused by domestic animals based on common-law negligence even in the absence of any proof of the owner's knowledge of prior vicious propensities, the Court of Appeals of New York holds that recovery for injuries caused by domestic animals may proceed only under strict liability standards and not on a common-law negligence theory" (***Suchdev v Singh,*** 2006 NY Misc Lexis 3699, 236 NYLJ 105 [Sup Ct, Queens County 2006]). A cause of action for ordinary negligence does not lie against the owner of a domestic animal which causes injury. Rather, the sole viable claim is for strict liability, and to establish such liability, there must be evidence that the animal's owner had notice of its vicious propensities. In the absence of such proof, there is no basis for the imposition of strict liability, (***Alia v Florina et al***, 39 AD3d 1068, 833 NYS2d 761 [3d Dept 2007]).

Historically, the Second Department has rejected attempts by plaintiffs to invoke a common law negligence theory as a basis of liability for a dog bite, the explanation being that liability is not dependent upon proof of negligence in the manner of keeping or confining the animal, but instead is predicated upon the owner's keeping of an animal despite knowledge of the animal's vicious propensities (*see* ***Ortiz v Bonacquisto,*** 2005 NY Misc Lexis 3363, 233 NYLJ 110 [Sup Ct, Putnam County 2005]; *see also* ***Roupp v Conrad,*** 287 AD2d 937, 731 NYS2d 545 [3d Dept 2001]***; Plennert v Abel,*** 280 AD2d 960, 719 NYS2d 918 [4th Dept 2001]***; Smith v Farner, Lynch v Nacewicz,*** 126 AD2d 708, 511 NYS2d 121 [2d Dept 1987]).

"Absent any violation of a statutory duty, it is well settled that one who keeps a vicious dog with knowledge of its vicious nature is presumed negligent if he does not keep the dog from injuring others. A

vicious nature includes, biting, jumping on people and running at large in a roadway. Conversely, lack of knowledge of a vicious nature is a complete bar to recovery since a plaintiff may not establish facts from which an inference of negligence may be drawn. The rule is apparently grounded in concepts of foreseeability and notice. Violation of a rule of an administrative agency or of an ordinance of a local government is some evidence which the jury may consider on the question of defendant's negligence. Under New York law, where a statute imposes a duty, violation thereof constitutes negligence, and obviates the need to prove the elements of common law negligence. Liability results where the injury is the very occurrence the statute is designed to prevent and the victim is a member of the protected class, provided proximate cause is also shown" (***Ayala et al v Hagemann et al,*** 186 Misc2d 122, 714 NYS2d 633 [Sup Ct, Richmond County 2000]). In ***Petrone v Fernandez et al,*** 2009 NY Slip Op 4694, 2009 NY Lexis 2035 [Court of Appeals of New York 2009], the court held that "when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule of strict liability for harm caused by a domestic animal whose owner knows or should have know of the animal's vicious propensities. The court further stated that "[a] defendant's violation of a local leash law is irrelevant in a claim of liability for harm caused by a domestic animal because such a violation is only some evidence of negligence, and negligence is not longer a basis for imposing liability."

In the further supplemental affirmation submitted by plaintiff on the basis that there has been a change in the law, the plaintiff now argues that NYS Office of Parks Recreation and Historic Preservation, Section 375.1, for activities absolutely prohibited, provides at section (n) "Animals. No person shall introduce or possess any animal except as otherwise provided in this subchapter or in the rules and regulations of a regional park, recreation and historic preservation commission." However, the testimony established that there were no signs posted on the beach restricting animals or ordering that dogs must be kept on a leash. It has not been demonstrated that the location of the subject incident is covered by this state statute, or if it is federally regulated. As set forth in ***Petrone v Fernandez,*** 12 NY3d 546, 883 NYS2d 164 [2009], the Court held that "[liability for harm caused by a domestic animal attached only where the owner knew or should have known of the animal's vicious propensities. The violation of a local leash law was irrelevant because such a violation was only some evidence of negligence, and negligence was no longer a basis for imposing liability." Based upon the testimony of the parties it is determined the defendant has demonstrated prima facie entitlement to summary judgment dismissing the common law negligence cause of action. The testimony establishes that Shea was not known to jump on people or charge them in play, and the plaintiff has raised no factual issue relative to the same (*see* ***Bannout v McDaniels***, *supra*).

In the further affirmation in support of her application, the plaintiff argues that since this motion was submitted, the Court of Appeals decided ***Hastings v Sauve***, 21 NY3d 122 [May 2, 2013], wherein it was decided that an animal owner could be held liable for negligent conduct by a farm animal who strays from its' own property, finding that the negligence of the owner as it relates to owners of domestic animals was a question of fact given the facts of each case. The Court set forth that "[w]e therefore hold that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal-i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7)-is negligently allowed to stray from the property on which the animal is kept. We do not consider whether the same rule applies to dogs, cats or other household pets; that question must await a different case." Thus, this court adheres to the established holdings and clear restraints articulated by the Appellate Division, Second Department, that when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in ***Collier v Zambit***, 1 NY3d 444, 775 NYS2d 205 [2004]; ***Petrone v Fernandez***, *supra*; ***Bard v Jahnke*** 6 NY3d

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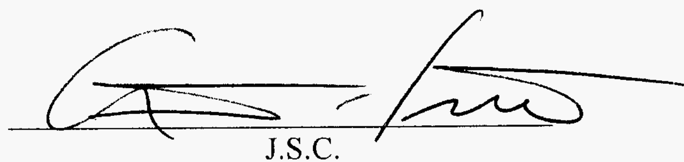
592, 815 NYS2d 16 [2006], that is, "New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal."

Accordingly, summary judgment is granted dismissing the cause of action premised upon negligence.

Dated: August 1, 2013



J.S.C.

_X_ FINAL DISPOSITION ____ NON-FINAL DISPOSITION