

Doerr v Goldsmith

2011 NY Slip Op 34185(U)

September 7, 2011

Supreme Court, New York County

Docket Number: 103840/10

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

WOLFGANG DOERR,
Plaintiff(s),

INDEX NO. 103840/10

- v -

MOTION DATE 08-24-2011

MOTION SEQ. NO. 001

DANIEL GOLDSMITH AND JULIE SMITH
Defendant(s).

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion and cross-motion to/ for Summary Judgment :

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED
FILED
1
2
3
SEP 08 2011

Cross-Motion: Yes X No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is Ordered that defendant, Julie Smith's ("Smith"), motion for summary judgment is denied.

On May 31, 2009, the plaintiff was riding a bicycle in Central Park. Plaintiff claims that as he was riding his bicycle around the inner traffic loop at the south west corner of Central Park, he observed a male holding a dog on the right side of the loop in a manner that he was almost hugging the dog and on the left side of the loop he saw a woman clapping her hands on her upper thighs. Plaintiff claims to have called out for the individuals to watch their dog and a split second later, the dog, who was not wearing a leash, was in the middle of the road. Plaintiff's bike struck the dog, and Plaintiff sustained injuries as a result of the collision. He claims that one to two seconds elapsed between the time when he first saw the individuals with the dog and when he collided with the dog. Plaintiff states he tried to apply his brakes when he recognized the situation, but to no avail.

Defendant Smith and defendant Goldsmith ("Goldsmith") were walking their dog in Central Park on the day in question. The dog was on leash for the walk from their apartment to the Park, but that upon entering the Park they removed the leash as is permissible at certain times per Park regulations. Smith claims she was crossing at a crosswalk to gain access to the interior of the Park, but that Goldsmith hesitated before crossing the street. Smith claims she walked out into the crosswalk and called the dog, which was waiting with Goldsmith. Smith states

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

that she heard someone screaming, she then turned around, and immediately saw a man on a bicycle crash into the dog. Smith claims the bicyclist came out of nowhere, that the roadway was empty with no one to be seen when she first entered the crosswalk.

Plaintiff commenced an action against the defendants for the personal injuries he sustained as a result of the accident in Central Park on May 31, 2009. Plaintiff alleges that defendant Smith caused his alleged injuries because she controlled and directed her dog into the path of the plaintiff causing plaintiff to collide with the dog which resulted in plaintiff being propelled from his bicycle and thereby suffering serious injury. Plaintiff claims that defendant(s) were reckless in that they knew the Park was frequented by bicycle traffic and knowingly created a dangerous condition by directing and encouraging the dog to cross a bicycle path.

Defendant Smith seeks dismissal of plaintiff's causes of action asserting that there is no evidence that the defendants harbored an animal with known, vicious propensities, or were negligent in any manner for causing the plaintiff's accident. Defendant Smith argues that plaintiff's negligence claims against the defendant must be dismissed because the Courts do not recognize a cause of action for negligence caused by the actions of an owner's domestic animal, especially in the absence of proof of that animal's vicious propensities.

Defendant Smith is correct to assert that where harm is caused by a domestic animal, the owner's liability is determined solely by the rule of strict liability. See *Petrone v. Fernandez*, 12 N.Y.3d 546, 910 N.E.2d 993, 883 N.Y.S.2d 164 (2009). In such cases, liability hinges upon whether the animal's owner knew or should have known of the animal's viciousness. However, plaintiff is not asserting that his alleged injuries were caused by the misconduct of the animal. Plaintiff asserts that his injuries were caused by the misconduct of the defendant in directing the dog to cross the street thereby colliding with plaintiff. Plaintiff's claims question the reasonableness of the conduct of Smith in directing the dog's movement in an unsafe manner that posed a foreseeable risk of harm to others.

The instant case can be distinguished from the cases cited by defendant by the fact that in the instant case the animal in question was acting as instructed by the owner. Plaintiff asserts that defendant's actions in calling the dog to cross the street posed a foreseeable risk of harm to others. The case law that establishes strict liability for harms caused by a domestic animal involve cases where the animal is acting of its own volition or reacting to a situation according to its animal instincts.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence demonstrating the absence of any material issue of fact. See *Klein v. City of New York*, 89 N.Y.2d 883, 652 N.Y.S.2d 723 (1996); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993); *Alvarez v. Prospect Hospital*,

68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party. See *SSBS Realty Corp. v. Public Service Mut. Ins. Co.*, 253 A.D.2d 583, 677 N.Y.S.2d 136 (N.Y.A.D. 1st Dept. 1998); *Martin v. Briggs*, 235 A.D.2d 192, 663 N.Y.S.2d 184 (N.Y.A.D. 1st Dept. 1997).

Plaintiff's claim challenges the reasonableness of the defendant's conduct in calling the dog to cross the street. Defendant has not made a prima facie case showing she is entitled to judgment as a matter of law through admissible evidence. Given the two accounts of what transpired just prior to the accident, a question is raised that must be decided by the trier of fact.

Accordingly, It is ORDERED that defendant Julie Smith's motion for summary judgment is denied.

This constitutes the decision and order of this court.

Dated: September 7, 2011



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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