Battenfeld v Chapman
2018 NY Slip Op 34324(U)
December 3, 2018
Supreme Court, Dutchess County
Docket Number: Index No. 52190/2016
Judge: Edward T. McLoughlin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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MORGAN BATTENFELD,

Plaintiff,

- against -

ISABEL F. CHAPMAN and PERFECTO MILLAN,

Defendants.

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DECISION and ORDER

Index No. 52190/2016

McLOUGHLIN, EDWARD T., AJSC

The following papers were considered in connection with defendants' motion for summary judgment seeking to dismiss the complaint:

Defendants' Motion/Affirmation /accompanying exhibits	25-36
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Plaintiff, Morgan Battenfeld, commenced this personal injury action against the defendants, Isabel F. Chapman and Perfecto Millan (hereinafter "defendants") claiming that the plaintiff sustained serious injuries as a result of defendants' negligence on September 5, 2015. The incident occurred on the front stairwell of the defendants' premises, also known as 4042 Route 9G, Red Hook. The alleged negligence includes harboring a dangerous dog, harboring and keeping a dangerous dog with vicious propensities and in causing and/or permitting the dog to attack the plaintiff when she approached the defendants' residence.

CPLR §3212(b) states in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be

established sufficiently to warrant the court as a matter of law and directing judgment in favor of any party." §3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

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. Wingrad v. New York University Medical Center, 64 NY2d 851; Zuckerman v. City of New York, 49 NY2d 557. Once such a showing has been made, the burden of proof shifts such that an opponent of a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. Alvarez v. Prospect Hospital, 68 NY2d 320.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as the absence of triable issues. Castlepoint Insurance Company v. Command Security Corp., 144 AD3d 731 (2nd Dept. 2016). Issue finding, as opposed to issue determination, is the key to summary judgment. Gitlin v. Chirinkin, 98 AD3d 561 (2nd Dept. 2012). In deciding a motion, a Court must view the evidence in the light most favorable to the non-moving party. See Kutkiewicz v. Horton, 83 AD3d 904 (2nd Dept. 2011).

In the defendants' motion for summary judgment in a dog bite case, the defendants bear the initial burden to demonstrate that prior to the incident giving rise to the action, the defendants were without knowledge that the animal possessed any vicious or dangerous propensities. Gannon v. Conti, 86 AD3d 704 (3rd Dept. 2011). If a defendant is able to meet this initial burden, then the burden shifts to the plaintiff to raise a triable question of fact whether defendant's knew or should have known that their dog had vicious propensities. Buicko v. Neto, 112 AD3d 1046 (3rd Dept. 2013).

In establishing whether a defendant knew or should have known that there dog had vicious propensities, it is not required that there be evidence of a prior human biting. Lagoda v. Dorr, 28 AD2d 208 (3rd Dept. 1967). Proof sufficient to demonstrate a dog's vicious propensities may include evidence that the dog was tethered at all times when not in the house, that the dog was territorial, that the dog engaged in aggressive barking when his space was invaded, that the animal frequently jumped on people and/or that he attacked another animal. See Calabro v. Bennett, 291 AD2d 616 (3rd Dept. 2002).

In light of the admissible evidence, and giving the plaintiff the benefit of every favorable inference (Blake-Veeder Realty v. Crawford, 110 AD2d 1007 (3rd Dept. 1985), the defendant's motion for summary is granted.

The plaintiff's own deposition testimony does not support her claim of prior vicious propensities of the dog "Blackie". The plaintiff encountered "Blackie" on multiple occasions prior to September 5, 2015, and each of those encounters proved uneventful.

The affidavit of an out-of-state, un-deposed witness is unpersuasive. The deposition of J.P. McConaty does not provide an evidentiary basis to demonstrate any vicious propensities of "Blackie". That the dog may have had an adverse reaction to Mr. McConaty on one isolated occasion does not create the factual support to demonstrate that "Blackie" had vicious tendencies.

The instant matter is factually very similar to the fact pattern found in Collier v. Zambito, 1 NY3d 444. In Collier, supra, the New York State Court of Appeals upheld the Appellate Division's decision which granted summary judgment for the defendant in that dog bite case.

Nor is this Court persuaded by the non-party testimony of Brian Gallagher. The information conveyed by Mr. Gallagher regarding possible prior events involving a Mr. Leonard

Hummel would constitute hearsay as they are being offered for their truth through a third-party witness. Even if the Court were to consider such statements by Mr. Gallagher, the same would be of limited or no evidentiary value as any possible prior incident occurred more than ten years before the September 5, 2015 events and there is no indication that, if it occurred, the animal involved was "Blackie".

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
November 2/3, 2018

HON. EDWARD T. McLOUGHLIN
Acting Justice Supreme Court

TO: Steven M. Meeley, PLLC
24 Closs Drive
Rhinebeck, NY 12572

Sami P. Nasser, Esq.
Burke, Conway & Dillon
10 Bank Street, Suite 1200
White Plains, NY 10606