

Velez v Andrejka

2013 NY Slip Op 32370(U)

September 25, 2013

Sup Ct, Queens County

Docket Number: 20387/11

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE

IA PART 6

DALIA VELEZ,
Plaintiff,

Index
Number 20387/11

-against-

Motion Date May 31, 2013

IVOR ANDREJKA, et al.,
Defendants.

Motion Seq. No. 3

Motion Cal. No. 157

The following papers numbered 1 to 15 read on this motion by defendants Westwood House LLC, Mason Management Services d/b/a, sued herein as Stellar Management, and Mason Management Services Corp. for an order granting summary judgment dismissing the complaint and all cross claims.

| | <u>Papers Numbered</u> |
|---|----------------------------|
| Notice of Motion-Affirmation-Affidavits-Exhibits..... | 1-7 |
| Affidavit-Exhibits..... | 8-10 |
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Upon the foregoing papers the motion is determined as follows:

Plaintiff, Dalia Valez commenced this action on August 23, 2011, and alleged that she sustained personal injuries on November 26, 2010, as the result of an accident involving a dog owned by defendant, Ivor Andrejka. The alleged accident occurred on the premises of the real property known as 50 West 93rd Street, New York, New York 10025. The subject real property is owned by defendant Westwood House LLC, and is managed by Mason Management Services Corp., doing business as Stellar Management.

Plaintiff alleges in her complaint that the defendants “had charge of a dog with a known propensity to be vicious and dangerous, living on the premises”; that she was

chased by a vicious and dangerous dog causing her personal injuries; and that the dog was uncontrolled and unrestrained. In her bill of particulars, plaintiff alleges that the defendants negligently trained the dog to attack and scare people, and that the defendants negligently allowed the dog to become a nuisance by failing to comply with the local leash law, section 161.05 (a) of the New York City Health Code (24 RCNY 161.05 [a]).

Defendants Westwood House LLC, Mason Management Services Corp., doing business as Stellar Management, sued herein as Stellar Management and Mason Management Services Corp. served an answer and interposed a cross claim against Ivor Andrejka for common law indemnification and contribution and eleven affirmative defenses.

Defendant Ivor Andrejka served an answer and interposed five affirmative defenses and a cross claim for common law indemnification.

Ms. Velez testified at her deposition that on November 26, 2010 she was employed as a home health aide, and worked at a client's home in the apartment building located at 50 West 93rd Street. This was the first time she was at the subject building. At 5:00 p.m., she left the premises and exited the building into the building's rear courtyard. Ms. Velez stated that the exit door locked behind her and she began to walk out into the court yard and turned right onto the pathway towards a ramp, when she observed the dog Harry, defendant Ivor Andrejka's then two-year old American Staffordshire Terrier. She also observed that a man, Mr. Andrejka, was in the courtyard. Ms. Velez states that the dog was not on leash and that she heard it barking and growling. She attempted to re-enter the building but was unable to open the locked door. She then walked to her left to see if she could exit, and stated that Harry came running towards her, barking and growling. Ms. Velez stated that she believed that the dog was about to attack her and she jumped over a fence and fell to ground, sustaining personal injuries. Prior to jumping over the fence, there was no physical contact between Ms. Velez and Harry. After she fell, she held up a sweater and the dog came into contact with her, and took her sweater. Mr. Andrejka then put a leash on Harry, returned the sweater to Ms. Velez and entered the building. Ms. Velez stated that she called 911, and that another person let her into the building and she entered the lobby to await the police and medical assistance.

Mr. Andrejka testified at his deposition that he and Harry were in the courtyard for approximately 40 minutes before Ms. Velez exited the building. He stated that he was hitting a ball with a tennis racquet and that Harry would chase the ball. Mr. Andrejka stated that he observed Ms. Velez exit the building, that she was talking loudly on a cell phone while walking back and forth from the exit to the ramp, and then attempted to re-enter the building. He stated that Harry was not barking or growling and had run up the

ramp when Ms. Velez jumped over the fence and fell to the ground. He stated that there had been no contact between Harry and Ms. Velez prior to her climbing over the fence.

Mr. Andrejka stated that Harry was a well-tempered submissive dog and would not attack anyone. He also stated that after November 26, 2010, signs were posted in the building stating that dogs were required to be on a leash. Mr. Andrejka further testified that Joseph Rivera, a tenant in the neighboring building has several dogs and has harassed and intimidated his wife and made unsubstantiated complaints against her.

Joseph Rivera, a tenant at 70 West 93rd Street, testified at his deposition that prior to the plaintiff's accident he had made complaints to the building manager about Harry and other dogs in the courtyard off their leashes. He also testified that on November 10, 2010 he was sitting in the courtyard with his dog Max, when a small terrier ran in his direction while barking, and that he got up and began to leave the area. He stated that after he saw the terrier, he observed Harry and two other dogs, who were off the leash, growling and barking and running in his direction and that he left the area. He stated that there was a closed gate and that Harry and the other dogs were on the other side of the gate. There was no contact between Mr. Rivera and Harry or another of the other dogs. Mr. Rivera stated that he called the building manager and the police to complain about the dogs being off the leash.

Mr. Rivera also stated that he owns six dogs; that he complained to the building's doormen about Harry and other dogs being off the leash; and that he has had numerous incidents with Mrs. Andrejka between 2005 and November 2010, involving dogs the Andrejkas previously owned, as well as Harry. He stated that he made complaints to the local police precinct about Mrs. Andrejka, as well as to the NYPD Department of Internal Affairs, the Police Commissioner, and others. He claimed that Mrs. Andrejka was constantly trying to get her dog to attack his dog during the two weeks prior to the plaintiff's accident. There was no contact between Harry and Rivera or his dogs during that two-week period.

The subject premises shares the courtyard with the premises located at 70 West 93rd Street, which is also owned by Westwood House LLC. Lou Pedraza, the property manager for Mason Management Services Corp., doing business as Stellar Management, states in an affidavit that he manages the premises located at 50 West 93rd Street and 70 West 93rd Street; that he was informed of Ms. Velez's accident by the acting superintendent/handyman Manuel Zorilla, sometime after November 26, 2010; that he was aware that prior to November 26, 2010, Harry and other dogs were running in the courtyard without a leash; that he was never made aware by anyone that Harry ever bit, charged or growled at anyone or made any type of aggressive or threatening action towards anyone. Mr. Pedraza states that over the years Mr. Rivera has made "numerous and incalculable" complaints regarding different issues; that he mentioned on one occasion that dogs were running without a leash within the courtyard before and after

November 26, 2010; that at no time did Mr. Rivera make a complaint about any particular dog, including Harry, and made no complaints about Harry ever threatening, biting, lunging, attacking, or acting aggressively towards anyone. He further states that at no time did he receive a telephone call from Rivera in which he indicated that he had been attacked by Harry or that Harry had acted in an aggressive manner towards him.

Mr. Zorilla, in his deposition and affidavit states that he did not witness the plaintiff's accident. He states that prior to November 26, 2010 he was aware that sometimes Mr. Andrejka's dog Harry would run in the courtyard without a leash; that he never observed nor was aware of any complaints that Harry acted in an aggressive manner towards anyone, or ever attacked, growled, lunged or acted in an aggressive manner towards anyone on or prior to November 26, 2010.

Smajlje Srdanovic, the regional property manager for Mason Management Services Corp., d/b/a Stellar Management, states in an affidavit that he oversees the subject real property and that he was not aware of any incidents concerning a dog running without a leash, attacking anyone or acting in an aggressive manner towards anyone at either 50 West 93rd Street or 70 West 93rd Street. He states that Mr. Pedraza is the on-site property manager and that such issues are Pedraza's responsibility and exclusively within Pedraza's knowledge.

Plaintiff does not dispute that Harry dog did not come into contact with her prior to her sustaining personal injuries, and that the dog did not thereafter bite or injure her. All of her injuries resulted from her fall.

"New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal" (*Egan v Hom*, 74 AD3d 1133, 1134 [2d Dept 2010]). To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog (*see Bard v Jahnke*, 6 NY3d 592 [2006]; *Sarno v Kelly*, 78 AD3d 1157, 1157-1158 [2d Dept 2010]; *Ali v Weigand*, 37 AD3d 628 [2d Dept 2007]). Insofar as relevant here, knowledge of a dog's vicious propensities may be shown, by, among other things, evidence of a defendant's awareness that the dog would "growl, snap or bare its teeth" (*Collier v Zambito*, 1 NY3d 444, 447 [2004]; *see Bard v Jahnke*, 6 NY3d at 597).

With respect to an animal's owner, when harm is caused by a domestic animal, the owner can be held liable if he knew, or should have known, of the animal's vicious propensities (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Collier v Zambito*, 1 NY3d 444, 446 [2004]; *see also Bard v Jahnke*, 6 NY3d 592, 596-597, 599 [2006]).

The term “vicious propensities” includes “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*, 1 NY3d at 446 [internal quotation marks omitted]). To that end, “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*, 1 NY3d at 447; *accord Krieger v Cogar*, 83 AD3d 1552, 1553 [2011]; *Barone v Phillips*, 83 AD3d 1523, 1524 [4th Dept 2011]). The case law makes clear, however, that behavior that is normal or typical for the particular type of animal in question is insufficient to establish a vicious propensity (*see Illian v Butler*, 66 AD3d 1312, 1314 [3d Dept 2009]; *Earl v Piowaty*, 42 AD3d 865, 866 [3d Dept 2007]; *Seybolt v Wheeler*, 42 AD3d 643, 645 [3rd Dept 2007]; *Campo v Holland*, 32 AD3d 630, 631 [3d Dept 2006]), and an animal’s “rambunctious behavior would show awareness of a vicious propensity only if it [was] the very behavior that resulted in [the] plaintiff’s injury” (*Campo v Holland*, 32 AD3d at 631; *accord Earl v Piowaty*, 42 AD3d at 866; *Seybolt v Wheeler*, 42 AD3d at 644).

The evidence submitted herein establishes that defendants Westwood House LLC, Mason Management Services Corp., d/b/a Stellar Management and Mason Management Services Corp., are entitled to summary judgment dismissing the complaint. It is undisputed that defendants were aware that a tenant, Mr. Andrajka, kept Harry on the premises and permitted him to run in the courtyard without a leash. Defendants, however, have established as a matter of law that they neither knew, nor should have known, of the dog’s alleged vicious propensities. There is no evidence that these defendants ever received any complaints that Harry engaged in any vicious behavior including biting, growling, lunging at, or attacking anyone while either on or off his leash.

The evidence submitted in opposition by the plaintiff is insufficient to raise an issue of fact as to whether Harry’s alleged vicious propensities were known, or should have been known, to the moving defendants. To the extent that Mr. Rivera complained to the property manager or his employees about Harry and other dogs being allowed in the courtyard off their leashes, this does not raise a triable issue of fact as to the moving defendants’ knowledge of Harry’s alleged vicious propensities. “The dog’s actions--barking and running around--are consistent with normal canine behavior. Barking and running around are what dogs do” (*Collier v Zambito*, 1 NY3d 444, 447 [2004]). Although Mr. Rivera claims Harry growled at him on one occasion, there is no evidence that the moving defendants were aware of this incident.

Mr. Rivera’s claim to have had conversations with unidentified tenants and building employees about Harry alleged vicious propensities, and his subjective assessment of Harry’s temperament based upon his breed, are insufficient to raise a triable issue of fact warranting the denial of summary judgment (*see Palumbo v Nikirk*, 59

AD3d 691[2d Dept 2009]).

Finally, to the extent that plaintiff alleges a violation of the local leash law, said violation is “irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability” (*Petrone v Fernandez*, 12 NY3d at 549-550).

In view of the foregoing, defendants’ motion for summary judgment dismissing the complaint and all cross claims is granted.

Dated: September 25, 2013

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Howard G. Lane, J.S.C.