

Medina v Reed

2013 NY Slip Op 32485(U)

September 20, 2013

Supreme Court, Suffolk County

Docket Number: 38805/2011

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Silvia Medina and Joaquin Medina,

Plaintiffs,

-against-

Cornelia Reed, individually and as Administratrix
of the Estate of Julia Reed, deceased,

Defendants.

Motion Sequence No.: 003; MGMotion Date: 7/3/13Submitted: 7/13/13Index No.: 38805/2011Attorney for Plaintiffs:Kenneth A. Wilhelm, Esq.
445 Park Avenue, 9th Floor
New York, NY 10022Attorney for Defendants:Nicoletti Gonson Spinner & Owen, LLP
555 Fifth Avenue, 8th Floor
New York, NY 10017Clerk of the Court

Upon the following papers numbered 1 to 20 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 14; Answering Affidavits and supporting papers, 15 - 17; Replying Affidavits and supporting papers, 18 - 20; it is

ORDERED that motion (003) by the plaintiffs, Silvia Medina and Joaquin Medina, pursuant to CPLR 3212 for partial summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the plaintiffs are directed to serve and file a copy of this order upon the defendant and the Clerk of the Calendar Department, Supreme Court, Riverhead, within twenty days

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of the entry of this order with the Clerk of the County of Suffolk, and the Clerk of the Calendar Department is directed to schedule this matter for a trial on damages forthwith.

Silvia Medina commenced this action alleging the defendants were negligent and strictly liable for injuries resulting from an unprovoked and sudden attack and bites to her stomach and leg by the defendants' dog, Spaz. A derivative action is plead on behalf of plaintiff's spouse, Joaquin Medina. The incident occurred at defendant's residence located at 688 Bridgehampton Turnpike, also known as 688 Sag Harbor Turnpike, Bridgehampton, New York. It is alleged that defendant Cornelia Reed harbored the allegedly dangerous and vicious dog named Spaz, a pit bull/dingo mix, which attacked the plaintiff on July 4, 2011, when she went to feed the dog for the defendant who was also present. The plaintiffs now seek summary judgment on the issue of liability in their favor.

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" (CPLR3212 [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]).

In support of the motion, the plaintiffs have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; affidavit of Silvia Medina; records from Southampton Animal Control; subpoenaed records from Southampton Town; photographs of Spaz; stipulation; and transcripts of the examinations before trial with proof of mailing for non-party witness Darryl Hemby dated August 7, 2012, non-party witness Michael Lorenz dated August 22, 2012, non-party Donald Bambrick dated August 22, 2012, and Cornelia Reed dated August 27, 2012.

A stipulation dated January 17, 2013, was signed by counsel for the plaintiffs and defendant, wherein it was agreed that Spaz bit the plaintiff on July 4, 2001; that Spaz bit non-party witness Mike Lorenz on June 16, 2011; that Spaz bit Darryl Hemby on September 12, 2006; and that the dog depicted in plaintiff's deposition Exhibits 2 and 3 is Spaz.

The 2006 record from Southampton Animal Control pertaining to a dog bite incident on September 12, 2006 involving Spaz and Darryl Hemby, a pedestrian, noted that the owner of the dog

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was Wayne Street, whose nephew, Kevin Street, had been caring for the dog. A confinement order dated October 13, 2006, was agreed upon by Kevin Street prior to releasing the dog from the shelter.

Silvia Medina averred that on July 4, 2011, she received a phone call from Cornelia Reed, a client for whom she cleaned house, asking her to come to her home to help her. When she arrived at Reed's home at 638 Bridgehampton/Sag Harbor Turnpike, Bridgehampton, New York, Reed told her that she could not walk and needed help feeding the dog, Spaz, who was in the back yard. Reed fixed a bowl of food, filled another bowl with water, and gave them both to Medina. Medina continued that she went into the backyard with Reed and both bowls. When Medina was within several feet of the dog, she placed the food bowl down, and the dog started to eat. She then went to place the water bowl next to another empty bowl near the dog, when the dog suddenly attacked her. He bit her twice, once on her stomach and then on her knee. Medina continued that at no time did she touch, make contact with, agitate, or otherwise provoke the dog.

Non-party witness Donald Bambrick testified that he has worked as the animal hospital supervisor for 25 years. He supervises the animal control officers and acts as liaison to the shelter which is a private entity. He identified pictures of Spaz printed from the computer records of Southampton Animal Control, one taken in 2006 when Spaz had been impounded after a dog bite incident he was involved in, and the second was taken between November 2010 and March 2011 while Spaz was staying at the shelter. Upon seizure, Spaz, a pit bull mix, was assigned a number which remains with him for identification purposes and links the dog to the computer. Michael Street was identified as the uncle of the owner of Spaz, Kevin Street. There were 29 animal control cards and three dog bite scratch reports in the records. The first incident was on September 12, 2006 involving Darryl Hemby, a second incident was on June 16, 2011 involving Mike Lorenz, and a third incident was on July 4, 2011 involving Silvia Medina. Darryl Hemby filed a complaint against Kevin Street under Agriculture and Markets Law § 121 with Southampton Justice Court which issued an order to confine Spaz. On November 30, 2010, Spaz was picked up and kept at the shelter for several months until Kevin Street contacted the shelter, at which time the dog was returned to him on or about March 2011. Thereafter, Cornelia Reed called the shelter stating she could not care for the two dogs, Spaz and another dog. When Mike Lorenz responded to the call from Cornelia Reed involving the animal welfare check, he was bitten by Spaz at Cornelia Reed's home at 688 Bridgehampton/Sag Harbor Turnpike. Thereafter, Cornelia Reed advised them that she found someone else to help care for the dogs, Silvia Medina, who was subsequently bitten on July 4, 2011.

Darryl Hemby testified to the extent that on September 12, 2006, he was the victim of a dog bite attack on Huntington Crossway, Bridgehampton, in front of the home of his friend, Maurice Manning. He stated that the dog that bit him, Spaz, was kept at Bridgehampton/Sag Harbor Turnpike by either Kevin Street or Wayne Street. Spaz was tied to a street or sign pole, but broke his leash and attacked him as he was walking toward the Manning home. When he saw the leash break, Hemby ran toward his van and jumped on top of it, where he remained for about twenty seconds, yelling for someone to come get the dog. He then threw a lighter at the dog, and missed, and fell off the roof of the van onto his back toward the barking dog. The dog then attacked him, biting him in the groin, and on his hand, forearm, thigh, calf, and ankle. Wayne Street came out of

Maurice Manning's house and intervened by grabbing the dog. Several years later he heard Medina had been bitten by Spaz.

Michael Lorenz testified that he was employed by the Town of Southampton Department of Animal Control, Hampton Bays, as an animal control officer. He reviewed a June 16, 2011 activity card which indicated that he was bitten in his left calf by a dog named Spaz. The incident occurred in the backyard of the house at 688 Bridgehampton/Sag Harbor Turnpike occupied by Cornelia Reed. He identified the dog from a photograph. Lorenz testified that he was at the house to remove dogs, Spaz and Kingo, from the property at the request of Cornelia Reed. He first went to her location in the morning but did not secure the dogs as they showed aggression, so he decided to return with someone else to help him. Cornelia Reed told him the dogs could be "iffy," which to him meant that the dog could be aggressive or had been in the past. When he returned, both dogs had collars with leashes which were secured. While he and a co-worker were removing Kingo with a snare pole from the premises, Lorenz stated that he must have stepped within range of Spaz who then bit him on the leg. Lorenz stated that he did not approach Spaz or face him or make any threatening gestures at him. He stated his record indicated that Kevin Street was the owner of Spaz. He had a prior call about Spaz on November 30, 2010 as Spaz was running at large aggressively at 460 Bridgehampton/Sag Harbor Turnpike. He and an officer retrieved Spaz in the woods. They removed the dog, placed him in their truck, and tried to contact the owner. Lorenz continued that prior to that incident, his office received a complaint about a possible neglect matter involving Spaz. On that occasion, when he arrived at 460 Bridgehampton/Sag Harbor Turnpike, he found Spaz tied to a doghouse located in front of the steps to the house. He spoke with Kevin Street at the time, advising him what he had to do.

Cornelia Reed testified that she has owned the house at 688 Bridgehampton/Sag Harbor Turnpike since 2005. She subdivided the property into three lots identified as 688, 690 and 692. Although her home was at 690, she continued to use the 688 address. There was also a yellow cottage on the property at 692 which was torn down in about 2008 or 2009. Reed testified that Kevin Street lived in the yellow cottage with Spaz and Spaz's puppy, Kingo. Sometime after the cottage was taken down, Kevin Street, Spaz and Kingo moved in with her on an intermittent basis for five years, and were living at her home in 2010. He put a dog house in Reed's back yard for the dogs who wore collars and leashes in the yard.

Reed continued that Kevin Street was the legal owner of Spaz at the time Silvia Medina was bitten, and that Spaz had been previously owned by Kevin Street's uncle, Wayne Street. She stated that Spaz looked like a pit bull, but Kevin told her the dog was a pure breed "African something". She paid for Spaz's shots at the veterinarian. She recalled Spaz was involved in a dog bite incident before 2008, around the time Wayne Street dropped Spaz off with Kevin and walked away. At some point when Kevin Street was arrested, she called the animal shelter asking to have Kingo removed as he was unruly. That was when Mike Lorenz from animal control was bitten by Spaz on her property.

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Reed testified that about a week before Spaz bit Silvia Medina, Kevin Street went to jail. Before Kevin Street went to jail, she did not participate in Spaz's care and did not give him food and water. She later testified that she managed to feed Spaz only once because she could not walk out back where the dog was as the grass was too high and the earth too uneven, and she had suffered a stroke on November 12, 2011. A female friend of Kevin Street then came by to feed Spaz, but she was arrested. On other occasions, Kristen Morgan, Kevin Street's "common law wife" would sometimes feed Spaz. On the date of the incident wherein Medina was bitten, Reed testified that she asked Medina to come to her house as a favor. She was concerned she might fall as she fed Spaz and wanted someone there to help her up. She then testified that it was the first time she was feeding Spaz. Reed testified that she first met Silvia Medina in 2005 when Medina was working at Mickey B's deli. She stated Medina also cleaned her house. When Medina arrived to help her feed Spaz, Spaz was in the back yard. Reed mixed dog food and water in a bowl, as she had done before to feed him, and started into the back yard, with some difficulty going down the back steps. At some point, either in or out of the house, Medina took the bowl. When Medina went to put the bowl of food down about three feet from the dog, Spaz took a bite of food and then suddenly lunged at Medina, bit her, and went back to eating his food. Medina fell to the ground, out of Spaz's reach. After that, Reed called animal control and told them they had to come to get Spaz. She did not remember telling Medina that Spaz had previously bitten others. She did not think she ever told Medina that Spaz was dangerous.

Ownership of a dog by a defendant is not a necessary condition to recovery, as keeping or harboring the dog is sufficient (*Holzer v Rosenberg*, 209 AD 823 [2d Dept. 1924]). A person who harbors or keeps a dog with knowledge of the dog's vicious propensities is liable for injuries caused by the dog (*Dufour v Brown*, 66 AD3d 1217, 1218, 888 NYS2d 219 [3d Dept 2009]; see also *3720 Homes Inc. v Hymn*, 30 Misc3d 79, 918 NYS2d 814 [App Term, 1st Dept 2010]). Here, there is no doubt that the dog Spaz lived at the premises owned and occupied by Cornelia Reed, and that Reed exercised some degree of control by caring for the dog and making arrangements for assistance in feeding the dog, including asking the plaintiff to assist her with that chore. The fact that Cornelia Reed was not the owner of Spaz does not shield her from liability. The evidence before this Court demonstrates that Reed knew the dog was being kept on her premises, that she knew or should have known that the dog had vicious propensities, and that she had sufficient control of the premises to remove or confine the dog (see *McKnight v ATA Housing Corp.*, 94 AD3d 957, 942 NYS2d 210 [2d Dept 2012]).

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 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

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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]). Liability is premised upon the owner's keeping of the animal despite his knowledge of the animal's vicious propensities (*Smith v Farner*, 229 AD2d 1017, 645 NYS2d 355 [4th Dept 1996]). 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*, 1 NY3d 444, 446, 807 NE2d 254, 775 NYS2d 205 [2004], quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]). Here, the evidentiary proof demonstrates that Cornelia Reed knew of Spaz's vicious propensities and prior bites and attacks. Reed testified that she recalled Spaz was involved in a dog bite incident before 2008, around the time Wayne Street dropped Spaz off with Kevin and walked away. At some point when Kevin Street was arrested, she called the animal shelter asking to have Kingo removed as he was unruly. That was when Mike Lorenz from animal control was bitten. Thus, Reed had prior knowledge of Spaz's vicious propensities prior to Spaz attacking Silvia Medina.

Based upon the foregoing, it is determined that plaintiffs have demonstrated *prima facie* entitlement to summary judgment on the issue that defendant Cornelia Reed is strictly liable in damages for the injuries sustained by the plaintiff during the attack on July 4, 2011 by Spaz, the dog being harbored by defendant Reed. It is further determined that the defendant has failed to raise a factual issue which precludes summary judgment in the plaintiff's favor.

Among the contentions set forth by defendants is the allegation that Reed was not a landlord and that she did not have any relationship with Spaz. Such assertion is belied by the evidentiary proof, however, that Kevin Street resided in Reed's home, that Reed paid the veterinarian bills for Spaz's shots, and that Reed assumed Spaz's care and harbored the dog at her home when Kevin Street was incarcerated. Defendant could have called animal control to take Spaz to the shelter as she did with Kingo, but she chose not to do so. This Court has considered defendants' remaining contentions and finds that they do not raise factual issues to require a trial.

Counsel for defendant Reed also asserts that plaintiff's injuries were due to her assumption of the risk and not due to any fault by Reed. Reed's testimony clearly established that she did not warn the plaintiff prior to the incident of any dangerous propensities that Spaz had, nor did she impart to Medina that the dog had previously bitten two other persons. In the twenty seconds Reed and Medina walked from the back steps of the house up to within three feet of the dog, Reed did not warn Medina not to approach the dog, nor did she tell Medina that she herself would feed the dog. There is no risk assumed by the plaintiff in this strict liability situation.

The Court of Appeals of New York has held that recovery for injuries caused by domestic animals may proceed only under strict liability standards and not on a common-law negligence

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theory (see *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]). Accordingly, partial summary judgment on the issue of liability in strict liability only is awarded.

Dated: 9/20/2013


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION