

Bonelli v Bonelli

2017 NY Slip Op 30413(U)

January 13, 2017

Supreme Court, Suffolk County

Docket Number: 09238/2014

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

Phillip J. Bonelli,

Plaintiff,

-against-

Glen P. Bonelli, Sheila Buchheit and
General Environmental Services, Inc.,

Defendants.

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Motion Sequence No.: 001; MOTD
Motion Date: 5/22/16
Submitted: 8/10/16

Motion Sequence No.: 002; XMOTD
Motion Date: 7/13/16
Submitted: 8/10/16

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Clerk of the Court

Upon the following papers numbered 1 to 26 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 13; Notice of Cross Motion and supporting papers, 14 - 22; Answering Affidavits and supporting papers, 14 - 22; 25 - 26; Replying Affidavits and supporting papers, 23 - 24; it is

ORDERED that plaintiff's motion seeking partial summary judgment on the issue of liability as against defendants is granted as to defendant General Environmental Services, Inc., and is otherwise denied; and it is further

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ORDERED that defendants' cross motion for summary judgment dismissing the complaint is granted only to the extent set forth herein, and is otherwise denied.

Plaintiff Phillip Bonelli commenced this action to recover damages for personal injuries he allegedly sustained on September 9, 2013 as the result of an attack by a dog, named Joey, harbored on commercial property occupied by defendant General Environmental Services, Inc. ("GES"). The alleged attack occurred while plaintiff, the son of defendant Glen Bonelli, was returning a borrowed box truck to the yard of GES, which is located at 9 Garretson Avenue in Wyandanch.

Plaintiff now moves for partial summary judgment on the issue of liability arguing that defendants knew of the dog's vicious propensities prior to plaintiff's incident and, therefore, are strictly liable for plaintiff's injuries. Plaintiff, in support of his motion, submits copies of the pleadings, the transcripts of the parties' deposition testimony, his own affidavit, numerous photographs, and a surveillance video allegedly depicting the subject incident. Defendants oppose plaintiff's motion and cross-move for summary judgment seeking dismissal of the complaint.

Defendant Glen Bonelli testified that he is the vice-president of GES, that his wife, defendant Sheila Bonelli (nee Buchheit), is the corporation's president, and that he and his wife are the sole corporate officers of GES. Mr. Bonelli stated that GES is located on approximately two acres of property, one acre of which is fenced in, and is comprised of a brick building and two trailers that house the corporate offices. He indicated that on the date in question, GES owned a dog named Joey, an American bulldog that Sheila Bonelli "rescued." Mr. Bonelli described Joey as a "very intimidating" "watchdog" that would bark and "stand up" if people came to GES's office. Mr. Bonelli stated that in those instances, either he or his wife would be forced to restrain the dog. Mr. Bonelli testified that Joey resided exclusively at the GES premises and that there were multiple signs hung on GES's fence and building, stating "Beware of Dog" and "Do Not Enter."

Mr. Bonelli described a number of incidents during which Joey exhibited violent tendencies. In the first incident, the dog barked and growled at a man named Joe Petrelli. Mr. Bonelli stated that subsequent to that incident, Joey attended approximately five sessions of obedience training, due to its becoming "more protective of his property." In a second incident, GES's bookkeeper, Mike Lusby, attempted to retrieve some files from the office and Joey growled at him. In a third incident, a man named Dominic Picarello entered GES's office unannounced and Joey "went after him and ripped his jacket." In a fourth incident, a former employee of GES, George Buchheit, playfully bit the dog's head and was, in response, bitten on his head by the dog. In a fifth incident, a man named "Kitty" who was renting parking space from GES, was chased by Joey.

Mr. Bonelli testified that on the date in question, he received a phone call from Sheila, informing him that his son, plaintiff Phillip Bonelli, was bitten by Joey and that she was transporting him to Good Samaritan Hospital. Mr. Bonelli stated that he inspected a hard drive containing surveillance footage of the subject premises, saw that it captured his son's incident, and turned the footage over to him. Mr. Bonelli indicated that Joey was subsequently euthanized as a consequence of the instant incident.

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Defendant Sheila Bonelli provided additional information regarding Joey's behavior, testifying that Joey once attempted to bite his veterinarian, Dr. Tim Jones. Mrs. Bonelli further testified that she was the only other person present at the time of Joey's attack on plaintiff. Regarding that attack, Mrs. Bonelli stated that she placed Joey in the back of her truck, then decided to put the dog "away" so that she could drive plaintiff to Port Washington. She indicated that she began telling Joey to come out of the truck, plaintiff joined in calling the dog, the dog exited the truck, and went over to him. She testified plaintiff petted Joey and "the next thing you know the dog was attacking him." Mrs. Bonelli explained that she was able to remove Joey from plaintiff by grabbing the dog's tail, then rushed plaintiff to the hospital. As to Joey's ownership, Mrs. Bonelli testified that despite listing her name as Joey's owner on Suffolk County Department of Health forms relating to plaintiff's incident, and Glen Bonelli listing his name as Joey's owner on the dog's registration paperwork, GES was the dog's true owner.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

"[C]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence" (*Morse v Colombo*, 31 AD3d 916, 917, 819 NYS2d 162, 163-164 [3d Dept 2006]; *see Claps v Animal Haven, Inc.*, 34 AD3d 715, 825 NYS2d 125 [2d Dept 2006]). "To recover in strict liability for damages caused by a dog bite, 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" (*Christian v Petco Animal Supplies Store, Inc.*, 54 AD3d 707, 707-708, 863 NYS2d 756, 757 [2d Dept 2011]). "Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm" (*Curbelo v Walker*, 81 AD3d 772, 773, 916 NYS2d 645, 646 [2d Dept 2011]). Owners or harborers of a dog with vicious propensities are not entitled to the benefit of the so-called "one free bite" rule (*see Matthew H. v County of Nassau*, 131 AD3d 135, 14 NYS3d 38 [2d Dept 2015]). As such, even dogs which have not previously bitten or attacked may subject its owners or harborers to strict liability where its propensities are apparent (*see Collier v Zambito*, 1 NY3d 444, 448, 775 NYS2d 205 [2004]; *Matthew H. v County of Nassau, supra*). In addition, the keeping of a dog as a guard

dog may give rise to an inference that the owner had knowledge of the dog's vicious propensities (see *Parente v Chavez*, 17 AD3d 648, 793 NYS2d 517 [2d Dept 2005]).

Here, plaintiff has established a prima facie case of entitlement to summary judgment in his favor as to defendant GES's liability by presenting competent evidence that Joey was kept as a guard dog for GES, that Joey lived exclusively at the property on which GES is situated, and that Joey exhibited vicious behavior on a number of prior occasions, about which it was aware prior to the September 9, 2013 incident (see *Curbelo v Walker*, *supra*; *Parente v Chavez*, *supra*). On the other hand, plaintiff has failed to establish, prima facie, the personal liability of defendants Glen Bonelli and Sheila Bonelli. Plaintiff has not offered evidence establishing those defendants' personal ownership of Joey, or that they were not acting in their capacity as employees of GES at the time of the attack. Plaintiff having made a prima facie case as to defendant GES, the burden then shifted to it to raise a triable issue of fact (see *Zuckerman v City of New York*, *supra*).

In opposition to plaintiff's motion for summary judgment, defendants argue that plaintiff's motion is procedurally insufficient in that plaintiff's counsel did not serve complete copies of the parties' deposition transcripts with his motion; that no proof has been presented that defendants Glen Bonelli and Sheila Bonelli had "speaking" authority for defendant GES; and that plaintiff voluntarily assumed the risk of interacting with the dog in question. In support of their arguments, defendants submit copies of the pleadings and transcripts of the parties' deposition testimony.

Defendant GES's arguments are insufficient to raise a triable issue. First, counsel for GES has not established that it did not receive full copies of all deposition transcripts during the discovery process, does not offer any authority for its contention that such defect is fatal, and offers no evidence that plaintiff's submissions to the Court are inaccurate. Second, the Bonelli defendants admit that they, alone, are the corporate officers of GES. By implication, absent any evidence to the contrary, they are the only parties who have "speaking" authority for GES. Counsel's third argument is without merit. As such, plaintiff has established a prima facie case of entitlement to summary judgment in his favor on the issue of GES's strict liability. Accordingly, plaintiff's motion for partial summary judgment is granted as to defendant GES, and denied as to defendants Glen Bonelli and Sheila Bonelli.

By their cross motion, defendants move for summary judgment dismissing the complaint against them. That branch of the motion seeking dismissal of the complaint against defendant GES is denied, as moot, in light of the Court's determination above. With regard to defendants Glen Bonelli and Sheila Bonelli, their counsel argues that given the evidence the dog in question was owned by GES, they are not liable for its actions. The Court finds the Bonelli defendants have established a prima facie case of entitlement to summary judgment, by offering uncontroverted testimony the dog was a "watch dog" for GES and did not reside in their personal home (see *Gomez v Superior Fleet Maintenance, Inc.*, 172 AD2d 1082, 569 NYS2d 260 [4th Dept 1991]; see also *Matthew H. v County of Nassau*, *supra*). The burden then shifted to plaintiff to raise a triable issue as to the Bonelli defendants' liability (see *Zuckerman v City of New York*, *supra*).

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In opposition to the Bonelli defendants' motion, plaintiff failed to adduce evidence sufficient to raise a triable issue. Plaintiff has not put forth evidence tending to rebut the Bonelli defendants' testimony that GES was the dog's sole owner, such as testimony that the dog lived in the Bonelli defendants' home. Accordingly, defendants' motion for summary judgment is granted as to the claims against Glen Bonelli and Sheila Bonelli.

Dated: 1/13/2017


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

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION