Golwitzer v Mason
2018 NY Slip Op 34299(U)
January 8, 2018
Supreme Court, Onondaga County
Docket Number: Index No. 2016EF4892
Judge: Donald A. Greenwood

At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on December 19, 2017.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

LESLIE GOLWITZER and STEPHEN CUMMINGS,

Plaintiffs,

v.

MARIO MASON and SHARON KULPA,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2016EF4892
RJI No.: 33-17-0188

APPEARANCES: **KEVIN T. HUNT, ESQ., OF GALE, GALE & HUNT, LLC**
For Plaintiffs

KAREN J. KROGMAN DAUM, ESQ., OF SMITH, SOVIK, KENDRICK & SUGNET, P.C.
For Defendants

Plaintiffs move for summary judgment on strict liability in this dangerous dog case and also seek to dismiss defendants' affirmative defense of, *inter alia*, assumption of risk and contributory negligence and seeks leave to serve an amended pleading. The parties in this matter were next door neighbors. On October 12, 2016, plaintiff Golwitzer was outside with her fourteen month old grandson. The dog, "Pipp" was enclosed by a fence in defendants' yard. Plaintiff's grandson pointed at the dog and appeared interested in it so defendant Mason placed the dog on a leash and brought it over to plaintiffs' driveway. Plaintiff lowered her hand toward the dog and the dog bit plaintiff in the leg.

In so moving, plaintiffs rely upon the pleadings, defendants' bills of particulars, as well as the deposition testimony of plaintiffs Golwitzer and Cummings, defendants Mason and Kulpa and non-party witness Eric Louis. In addition, plaintiffs provide uncertified records from an animal shelter and veterinary medical center.

1. Summary Judgment on Liability

In New York State the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. *See, Collier v. Zambito*, 1 NY3d 444 (2004). Vicious propensities include the "propensity to do any act that may endanger the safety of the persons and property of others in a given situation". *See, Collier, supra.* Knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the owner had notice and a triable issue of fact as to knowledge of a dog's vicious propensities may be raised even in the absence of proof that the dog had actually bitten someone by evidence that it had been known to growl, snap or bare its teeth. *See, id.* It is also potentially relevant whether the owner chooses to restrain the dog and the manner in which the dog was restrained. *See, id.* In addition, vicious propensities are established where the dog had a natural inclination or habitual tendency to act in a manner that could endanger another. *See, Bard v. Jahnke*, 6 NY3d 595 (2006). To reach this determination the fact finder can consider the attack on plaintiff, results of the attack, the animal's attitude or disposition when people approach it and whether the animal previously attacked other people. *See, PJI 2:220.*

Plaintiffs argue that they are entitled to summary judgment on the issue of liability as there is no question of fact that the defendants were harboring a vicious dog, claiming that prior to the attack the dog had a long standing history of aggressiveness. As evidence thereof plaintiffs point to the deposition testimony of Eric Louis, a dog trainer, who testified that in the late summer or early fall of 2016 he was retained by the defendants and that when he visited the home the dog had to be kept on a leash due to concerns that it was aggressive, that it showed facial and postural signs that it could "possibly be aggressive" and that he opined that the dog had fear related aggression. He based his conclusion upon some of the things that the defendants had told him, including comments on the dog's barking, particularly when people came by the fence. Both plaintiffs likewise testified that they had observed the dog race up and down the fence line, barking if someone walked or drove by. Louis likewise testified that defendants admitted that they would leash the dog when visitors came to their house and defendants had informed him that the dog had bitten individuals prior to his consultation, stating that he "believe[d]" that his notes indicated a prior bite and that there might have been several incidents. Louis made a number of recommendations, such as using a head halter or Gentle Leader, and that the dog not be allowed to be close to people where it might be barking or feel threatened. In addition, he suggested the use of pharmacological intervention and alleges that he informed defendants that the only guaranty that the dog would not bite someone in the future would be to consider euthanasia. Plaintiffs further point to the defendants' deposition testimony that they would place the dog in another room when visitors stopped by, as well as the fact that on October 14, 2016, two days after the attack, the dog was euthanized. Plaintiffs thus argue with respect to the issue of knowledge, the defendants had both actual and constructive knowledge of the dog's

propensities as they had actual knowledge of vicious propensities and notice of prior acts of a similar kind. *See, Collier, supra.* As such the plaintiffs have met their burden in the first instance on this issue and the burden shifts to the defendants to raise an issue of fact on the issue of liability. In addition, the plaintiffs point to records from Wanderers Rest and DeWitt Veterinary Medical Center for their argument that the dog previously bit someone and had vicious propensities. However, neither record is certified or authenticated and thus both are inadmissible.[1] *See, Ciliotta v. Ranieri*, 45 Misc.3d 122(A) (Kings Co. 2014).

The defendants have done so by demonstrating that there are questions of fact as to a prior bite, as well as vicious propensities. Defendant Sarah Kulpa specifically disputes Louis' testimony concerning a prior bite and states unequivocally that the dog did not bite anyone prior to plaintiff's incident, nor did she or her co-defendant, Mario Mason, represent that it had bitten anyone to Louis. She further disputes that Louis ever recommended euthanasia during their appointment, indicating that Louis provided various training techniques and also provided positive feedback about the dog. She indicates that based on the use of those techniques defendants saw an improvement in the dog walking on a leash, jumping and barking. She indicates that it was not until after the incident that she contacted Louis and that he recommended that the dog be euthanized. Further Kulpa notes that Pipp was a family dog who interacted with her five year old son on a daily basis and that had there been any problems she would have promptly found a new home for the dog. Kulpa also testified at her deposition that the dog had

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[1] This Court is required to consider plaintiffs' submissions in the first instance with respect to the requirement to meet their burden on the summary judgment motion. Plaintiffs submitted corrected records in their reply papers, however those records are not considered with respect to plaintiffs' initial burden. In any event, the defendants have disputed their alleged statements contained therein.

never bitten anyone previously and that she never witnessed any aggression on the dog's part prior to the incident. She further testified that she would place the dog in another room when guests were at the house if someone did not like dogs, were afraid of them or if the nature of the visit was more professional than personal. Likewise, co-defendant Mason testified that he never observed the dog act in an aggressive manner prior to the incident, that the dog was placed in another room when visitors arrived, depending on the person's comfort level with dogs, and that a muzzle was used with the dog at the veterinarian because it was Kulpa's custom and practice with previous dogs she has owned and that it was a recommended precaution. In addition, both defendants dispute that they ever reported to the veterinarian that the dog had previously bitten someone. As such, the defendant has raised a triable issue as to knowledge of the dog's vicious propensities. Nor is there any uncontroverted proof that the dog was confined only because the defendant owners feared that he would do any harm to their visitors. *See, Collier, supra.* The plaintiffs' proof of the dog's actions of barking and running around are consistent with normal canine behavior as "barking and running around are what dogs do". *Collier, supra.* In addition, the fact that defendant Mason allowed the plaintiff and her young grandson to approach the dog "would seem to demonstrate that [h]e did not conceive of the possibility that the dog would attack the [plaintiff]". *Id; see also, Grillo v. Williams*, 71 AD3d 1480 (4th Dept. 2010). Therefore, the plaintiffs' motion for summary judgment on the issue of liability is denied.

2. Dismissal of defendants' affirmative defenses of Assumption of Risk and Contributory Negligence

Plaintiffs move to dismiss the defendants' affirmative defenses of assumption of risk and contributory negligence.[2] Plaintiffs rely upon the defendants' bill of particulars which alleges that plaintiff Golwitzer placed her hand in front of the dog, created an uncomfortable situation startling and taunting the dog with her hand and failed to recognize a danger, to exercise the degree of care and caution of a reasonable person and failed to take proper precautions for her safety. Plaintiffs point to defendant Mason's deposition testimony, however, wherein he describes plaintiff's actions as making "a typical gesture towards the dog ... at normal speed, nothing quickly" as well as mason's deposition testimony describing the plaintiff's actions as normal action that a person would take upon greeting a dog. Plaintiffs likewise point to defendant Kulpa's deposition testimony, who was not present during the incident, that she did not know whether it was true or not that plaintiff taunted the dog. However, the doctrine of implied assumption of risk is a viable defense in an animal bite case. *See, Arbegast v. Board of Education of South New Berlin Central School*, 65 NY2d 161 (1985). Courts have likewise found questions of fact regarding both assumption of risk and comparative negligence in such a case. *See, Coole-Mayhew v. Timm*, 18 AD3d 948 (3rd Dept. 2005). In that case, although plaintiff was aware that the dog had previously barked and growled at the plaintiff and was separated from guests in the house, the plaintiff voluntarily entered the defendant's house not knowing whether the dog was free or what the dog's reaction would be. *See, Coole-Mayhew,*

[2] In their notice of motion the plaintiffs also seek dismissal of said defenses for failure to state a cause of action, lack of proximate cause and lack of notice. Those defenses are not specifically addressed by the plaintiffs and in any event the Court's findings with respect to denial of the summary judgment motion on the issue of liability addresses same.

supra. In addition the question of comparative negligence in interacting with an allegedly dangerous dog is proper to be considered by the jury. *See, Pisciotta v. Parisi*, 155 AD2d 422 (2d Dept. 1989). While plaintiffs contend on one hand that they observed the dog barking and running along the fence and were aware that it was separated into another room when guests were at home, plaintiff Golwitzer either requested or consented to having the dog brought to her driveway to allow her young grandson to see the dog, creating a question of fact on the issue of both assumption of the risk and comparative negligence. As such, the plaintiff's motion in this regard is denied as well.

3. Leave to serve an amended pleading.

Plaintiffs seek to add a claim in the ad damnum clause for punitive damages based upon the facts of this case. The law is well settled that absent prejudice to the non-moving party or a showing that the amendment is plainly lacking in merit, leave to amend should be freely given. *See, Laporta v. Wilmorite, Inc.*, 298 AD2d 920 (4th Dept. 2002). Plaintiffs have demonstrated that their claim for punitive damages is based on the same factual circumstances as previously alleged in the complaint. Plaintiffs claim that they only learned of defendant's reckless conduct during the deposition of Eric Louis in July of 2017 and that three days after the deposition they asserted a claim for punitive damages in their supplemental bill of particulars. A plaintiff is entitled to punitive damages where a defendant engages in wanton and reckless conduct where his or her conduct manifests spite or malice or a fraudulent or evil motive or such a conscious and deliberate disregard of the interest of others that the conduct may be called willful or wanton. *See, Marinaccio v. Town of Clarence*, 20 NY2d 506 (2013). Plaintiffs have established that they

are entitled to the amendment. When viewing the evidence in the light most favorable to them and considering Louis' allegations to be true, defendants conduct may be viewed as a conscious disregard of plaintiff Golwitzer's safety and reckless and wanton conduct. Thus, the amendment cannot be said to be patently lacking in merit. In addition plaintiffs have established that there is no prejudice to the defendants by allowing the amendment. However, it is important to note that this Court's determination granting plaintiffs leave to so amend does not constitute a finding that the plaintiffs are entitled to punitive damages in this matter. The plaintiffs are required to prove same at trial.

NOW, therefore, for the foregoing reasons, it is

ORDERED, that the plaintiffs' motion for summary judgment on the issue of liability is denied, and it is further

ORDERED, that the plaintiffs' motion for summary judgment on the issue of dismissal of the affirmative defenses is denied, and it is further

ORDERED, that plaintiffs' motion to amend the compliant to add punitive damages to the ad damnum clause is granted.

ENTER

Dated: January 8, 2018
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

Papers Considered:

1. Plaintiffs' Amended Notice of Motion, dated November 1, 2017.

2. Amended Affirmation of Kevin T. Hunt, Esq. in support of plaintiffs' motion, dated November 1, 2017, and attached exhibits.

3. Affidavit of Joseph Palmer, dated November 17, 2017.

4. Affirmation of Karen J. Krogman Daum, Esq. in opposition to plaintiffs' motion, dated December 12, 2017.

5. Affidavit of Sarah Kulpa, dated November 27, 2017.

6. Defendants' Memorandum of Law, dated December 12, 2017.

7. Affirmation of Kevin T. Hunt, Esq. in Reply to Defendants' Opposition, dated December 15, 2017, and attached exhibits.