

Wetzler v Hirtzel

2020 NY Slip Op 35232(U)

January 10, 2020

Supreme Court, Nassau County

Docket Number: Index No. 605429/16

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 6

RUSSEL WETZLER, X

Plaintiff,

Index No.: 605429/16
Motion Sequence...04
Motion Date...09/27/19
XXX

-against-

BRIAN HIRTZEL and CHRISTINE HIRTZEL,

Defendants.
_____ X

Papers Submitted:
Notice of Motion.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Upon the foregoing papers, the motion by the Defendant, CHRISTINE HIRTZEL, seeking an Order, pursuant to CPLR § 3212, granting her summary judgment and dismissing the Plaintiff's Complaint, is decided as hereinafter provided.

In February 2018, a motion seeking the same relief was filed (Motion Seq. 02) (*See* Notice of Electronic Filing, annexed to Defendant's Motion as Exhibit "A"). However, defense counsel subsequently learned that the Defendant, BRIAN HIRTZEL, passed away on November 24, 2017, prior to the filing of the summary judgment motion. As such, by letter dated February 22, 2018, defense counsel withdrew the prior motion without prejudice as the action was automatically stayed by operation of law due to the

death of the Defendant, BRIAN HIRTZEL (*See* Death Certificate and Letter, dated 2/22/18, annexed to Defendants' Motion as Exhibit "B").

Thereafter, on May 15, 2019, defense counsel filed a motion to dismiss the action based on the Plaintiff's failure to have a representative appointed for the Estate of the deceased Defendant. The motion was resolved by So-Ordered Stipulation dated June 10, 2019, whereby the action was discontinued with prejudice as against the deceased Defendant, BRIAN HIRTZEL, and his Estate; the stay was lifted; and the time for all parties to file motions for summary judgment was extended up to and including July 19, 2019 (*See* So-Ordered Stipulation, dated 7/10/19, annexed to the Defendant's Motion as Exhibit "D"). The instant application timely followed.

In this action, the Plaintiff seeks to recover damages for personal injuries sustained on May 22, 2016 at approximately 12:15 p.m., at or near the soccer field located on Grumman Road West, Bethpage, in the County of Nassau (hereinafter "Grumman Field"), where he was allegedly bitten by the Defendants' dog.

In support of their motion, the Defendant submits the Plaintiff's Examination Before Trial (hereinafter "EBT"), where the Plaintiff testified that he was attending his son's soccer game at Grumman Field when he saw the Defendants' dog (hereinafter "Ozzy"), a male rottweiler, restrained on a leash, walking past him near the sideline of the field (*See* Plaintiff's Deposition Transcript, annexed to Defendant's Motion as Exhibit "I" at pp. 35-36, 38). The Plaintiff testified that when Ozzy walked past him, there was no contact between him and Ozzy, nor did he hear Ozzy make any type of sound prior to the accident (*Id.* at pp. 38, 50). The Plaintiff subsequently testified, however, that he could not

recall whether he had made contact with the top of Ozzy's head or whether he had pet Ozzy prior to the accident (*Id.* at p. 102). In describing how the incident occurred, the Plaintiff testified that he kneeled on his right knee down to the ground and put his right hand out with his palm facing up extended towards Ozzy (*Id.* at pp. 48-49). At that time, Ozzy approached the Plaintiff and began smelling his right hand when the dog "lunged and grabbed" it and started to "shake and pull" (*Id.* at p. 50).

In further support of their motion, the Defendants also submit the EBT testimony and Affidavit of the Defendant, CHRISTINE HIRTZEL ("HIRTZEL") (*See* Defendant's EBT transcript and HIRTZEL Affidavit, sworn to on 6/30/19, collectively annexed to Defendant's Motion as part of Exhibit "H"). HIRTZEL testified that just prior to the bite incident, Ozzy was seated at the sidelines when the Plaintiff walked up to them and pet Ozzy's head (*See* Defendant EBT Transcript at p. 15). HIRTZEL testified that she was holding onto Ozzy's leash the entire time that the Plaintiff was petting Ozzy and that at no point did she feel any movement in Ozzy's leash prior to or at the moment Ozzy bit the Plaintiff (*Id.* at pp. 16-17).

HIRTZEL further testified that there were no prior instances of Ozzy biting someone, attempting to bite someone, baring his teeth, growling or showing aggressive behavior towards someone or another animal (*Id.* at p. 22). HIRTZEL also attests in her affidavit that Ozzy was never treated by their veterinarian for "distemper or any other aggressive behavior" (*See* HIRTZEL Affidavit at ¶ 15). She further attests that Ozzy is a well behaved, good natured dog and did not exhibit any evidence of vicious or aggressive behavior towards anyone including herself, her children or the Defendants' other two (2)

dogs (*Id.* at ¶ 7). According to HIRTZEL, prior to the date of the incident, Ozzy did not bite, scratch or attack another person or another animal, nor did he growl, snap or bare his teeth toward others (*Id.* at ¶¶ 8-9). HIRTZEL also confirmed that prior to the date of the incident she never received any complaints from anyone regarding Ozzy, nor were any violations or summonses issued by any municipal agency regarding Ozzy (*Id.* at ¶ 14).

The Defendant also submits the affidavit of Robert Moreback, an individual who was familiar with Ozzy (*See* Moreback Affidavit, sworn to on 07/15/19, annexed to Defendant's Motion as part of Exhibit "H"). Mr. Moreback attests that on May 22, 2016, he was made aware of an incident where Ozzy bit another person while he was at a soccer game at the subject soccer field (*Id.* at ¶¶ 1-2). Prior to that time, Mr. Moreback attests that he was not aware of anyone ever making a complaint about Ozzy; not aware of Ozzy ever biting another person or another animal; and never witnessed Ozzy baring his teeth, snapping, growling or exhibiting any aggressive behavior towards others or himself (*Id.* at ¶¶ 4-5). Based on his experience and knowledge of Ozzy, Mr. Moreback claims that Ozzy was a well-mannered dog without any discipline or behavioral issues (*Id.* at ¶ 6).

The Defendant also proffers the affidavit of George Pelcher, another individual that was familiar with Ozzy. Mr. Pelcher offered the same statements as Mr. Moreback concerning the absence of any prior incidents or complaints involving Ozzy and shared the opinion that Ozzy was a well-mannered dog without any discipline or behavioral issues (*See* Pelcher Affidavit, sworn to on 07/16/19, annexed to Defendant's Motion as part of Exhibit "H").

In opposition, the Plaintiff contends that Grumman Field explicitly prohibits animals in the field pursuant to Town of Oyster Bay Ordinance # 168-19¹. Counsel for the Plaintiff argues in opposition that the Defendants' failure to adhere to the Town's prohibition from bringing dogs to the subject soccer field, the incident would not have occurred. Solely on this ground, the Plaintiff argues that a question of fact exists warranting denial of the Defendants' motion.

“When harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities” (*Petrone v. Fernandez*, 12 N.Y.3d 546, 550 [2009] [internal citations and quotations omitted]). Liability under a negligence theory has been repeatedly rejected by the Court of Appeals where harm is caused by a domestic animal. (*Petrone v. Fernandez, supra*; *Doerr v. Goldsmith*, 25 N.Y.3d 1114 [2015]; *Bard v. Jahnke*, 6 N.Y.3d 592 [2006]; *Bloomer v. Shauger*, 21 N.Y.3d 917, 918 [2013]; *Smith v. Reilly*, 17 N.Y.3d 895, 896 [2011]).

In order to prevail on a theory of strict liability, 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 kept, knew or should have known, of such propensities (*See Bard v. Jahnke*, 6 N.Y.3d 592, 596 [2006]; *see also Collier v. Zambito*, 1. N.Y.3d 444, 446 [2004]). “In the absence of proof that the [dog] had bitten someone on a prior occasion,

¹ The Court notes that in support of this claim, the Plaintiff submits photographs of the signs allegedly posted outside Grumman Field as Exhibit “1”, which are not in admissible form.

knowledge of vicious propensities may be raised ‘by evidence that the animal had been known to growl, snap or bare its teeth’” (*See Dykeman v. Heht*, 52 A.D.3d 767, 769 [2d Dept. 2008] [citations omitted]). Knowledge of vicious propensities may be established by evidence of prior acts of a similar kind of which the owner had notice; the dog’s tendency to growl, snap or bare its teeth; the fact that the owner chooses to restrain the animal; the manner in which the animal was restrained; and the fact that the animal is kept as a guard animal (*See Curbelo v. Walker*, 81 A.D.3d 772, 773 [2d Dept. 2001]).

Even in the absence of a prior bite, a triable issue of fact regarding knowledge of vicious propensities may be raised by other evidence of a dog’s aggressive behavior. (*See Collier v. Zambito, supra* at p. 447). “[A]n 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” (*Id.*). Such behaviors can include the animal’s being territorial, aggressively barking when his area is invaded, attacking another animal and growling at and/or biting another animal (*See Jacobsen v. Schwarz*, 50 A.D.3d 964, 965 [2d Dept. 2008]; *see also Calabro v. Bennett*, 291 A.D.2d 616 [3d Dept. 2002]).

Furthermore, the Court of Appeals, in *Petrone*, held that violation of a local leash law, “which is merely ‘some evidence of negligence,’ is irrelevant and does not support a recovery in cases involving domestic-animal-related injuries” (*See Petrone v. Fernandez*, 12 N.Y.3d at 550, citing *Alia v. Fiorina*, 39 A.D.3d 1068 [3d Dept. 2007]).

In this matter, the Defendant has established her *prima facie* entitlement to judgment as a matter of law by submitting admissible evidence demonstrating that neither


BRIAN nor CHRISTINE HIRTZEL had any knowledge of any vicious propensities on the part of their dog. In opposition, the Plaintiff failed to demonstrate the existence of a triable issue of fact as to whether they had notice of the animal's harmful proclivities, and consequently, summary judgment is warranted on Plaintiff's strict liability claim (*See Smith v. Reilly*, 17 N.Y.3d 895 [2011]; *see also Collier v. Zambito, supra*; *Sarno v. Kelly*, 78 A.D.3d 1157 [2d Dept. 2010]). The Plaintiff himself testified that he did not witness Ozzy growl or make any kind of sound prior to the alleged incident. Furthermore, even if this Court were to consider the photographs provided by the Plaintiff alleging the violation of the Town Ordinance prohibiting animals in Grumman Field, such violations have been found to be irrelevant because it constitutes only "some evidence of negligence" and "negligence is not a basis for imposing liability" (*See Petrone v. Fernandez, supra*, citing *Alia v. Fiorina, supra*).

Accordingly, it is hereby

ORDERED, that the motion by the Defendant, CHRISTINE HIRTZEL, seeking an Order, pursuant to CPLR § 3212, granting her summary judgment and dismissing the Plaintiff's Complaint, is **GRANTED**, and the Plaintiff's Complaint is hereby **DISMISSED**.

This constitutes the decision and Order of this Court.

DATED: Mineola, New York
January 10, 2020



Hon. Randy Sue Marber, J.S.C.
XXX

ENTERED
JAN 13 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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