Andersen v David
2021 NY Slip Op 33712(U)
June 1, 2021
Supreme Court, Saratoga County
Docket Number: Index No. EF2020199
Judge: Dianne N. Freestone
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STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

LARS ANDERSEN,

Plaintiff,

-against-

TAYLOR DAVID,

Defendant.

DECISION & ORDER
Index No.: EF2020199
RJI No.: 45-1-2020-0269

PRESENT: HON. DIANNE N. FREESTONE
Supreme Court Justice

APPEARANCES:

Joshua D. Lindy, Esq.
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Glens Falls, New York

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Mineola, New York

Plaintiff Lars Andersen (hereinafter referred to as "plaintiff") commenced this personal injury action on January 16, 2020 by electronically filing a summons with notice in the Saratoga County Clerk's Office (see NYSCEF Document No. 1). On January 28, 2020, defendant Taylor David (hereinafter referred to as "defendant") appeared and filed a demand for the complaint (see NYSCEF Document Nos. 2 – 3). On January 31, 2020, plaintiff filed the complaint (see NYSCEF Document No. 4). Thereafter, defendant served an answer to the complaint, which interposed three affirmative defenses (see NYSCEF Document No. 5).

At approximately 3:10 p.m. on August 26, 2019, plaintiff, a mail carrier for the United States Postal Service, was reportedly bitten on his lower extremities by defendant's dog, a Pitbull named Roman (hereinafter referred to as "Roman"), while delivering mail to defendant's residence situated in the City of Glens Falls, County of Warren. Plaintiff brought this action against defendant for the injuries he purportedly sustained as a result of the incident.

Following joinder of issue and discovery, defendant moved by notice of motion dated December 11, 2020 for summary judgment dismissing plaintiff's complaint (see NYSCEF Document Nos. 9 – 15). On May 17, 2021, plaintiff opposed defendant's motion by attorney's affirmation with supporting exhibits A through E (see NYSCEF Document Nos. 18 – 23). On May 20, 2021, defendant submitted an attorney's affirmation in reply (see NYSCEF Document No. 25).

Defendant maintains she is entitled to summary judgment as she bears no liability for the subject incident as a matter of law. Specifically, defendant argues that "at no point in time did she ever have knowledge of any vicious propensities prior to the alleged incident herein." Defendant further argues that she did not have actual or constructive notice of any vicious propensities on the part of her dog prior to the subject incident. In opposition, plaintiff asserts that there are issues of fact based on the way defendant previously restrained Roman and "the vicious nature of the unprovoked attack on plaintiff."

It is well settled that "an owner of a dog may be liable for injuries caused by that animal only when the owner had or should have had knowledge of the animal's vicious propensities" (Hewitt v Palmer Veterinary Clinic, PC, 35 NY3d 541, 547 [2020]). "Once such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities" (Id. [quotation marks and citation omitted]). The Court of Appeals has declined to

permit a parallel negligence claim when harm is caused by a domestic animal and has held that an owner's liability is determined solely by application of the vicious propensity rule (Id.; see Bard v Jahnke, 6 NY3d 592, 599 [2006]; Petrone v Fernandez, 12 NY3d 546, 550 [2009]; see also Buicko v Neto, 112 AD3d 1046, 1046 [3d Dept 2013][*A cause of action for ordinary negligence does not lie against an owner of a dog that causes injury. Rather, the sole viable claim against the owner of a dog that causes injury is one for strict liability*]).

Generally, the proponent of a summary judgment motion is obligated to make a prima facie showing of its entitlement to judgment as a matter of law by tendering admissible evidence demonstrating the absence of a material question of fact (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Pullman v Silverman, 28 NY3d 1060, 1062 [2016]; Andrew R. Mancini Associates, Inc. v Mary Imogene Bassett Hosp., 80 AD3d 933, 935 [3d Dept 2011]; Freitag v Village of Potsdam, 155 AD3d 1227, 1229 [3d Dept 2017]). "In the context of a defendant's motion for summary judgment in a dog bite or attack case, the 'defendant bears an initial burden to demonstrate that, prior to the incident giving rise to the lawsuit, he or she was without knowledge that the animal possessed any vicious or dangerous propensities'" (Olsen v Campbell, 150 AD3d 1460, 1461 [3d Dept 2017], quoting Buicko v Neto, 112 AD3d 1046, 1047 [3d Dept 2013]; see Doerr v Goldsmith, 25 NY3d 1114, 1116 [2015]). "Only if the defendant meets this initial burden, does the burden then shift to the plaintiff 'to raise a triable question of fact as to whether defendant[] knew or should have known that [his or her] dog had . . . vicious propensities'" (Id.; see Reil v Chittenden, 96 AD3d 1273, 1274 [3d Dept 2012]). "Vicious propensities have been defined to include "the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (Hamlin v Sullivan, 93 AD3d 1013, 1013-14 [3d Dept 2012], quoting Collier v Zambito, 1 NY3d 444, 446 [2004]; see Modafferi v DiMatteo, 177 AD3d

1413, 1414 [4th Dept 2019]). "[E]vidence that the dog had been known to growl, snap or bare its teeth might be enough to raise a question of fact, depending on the circumstances" (Illian v Butler, 66 AD3d 1312, 1313 [3d Dept 2009][internal quotation marks and citation omitted]). "In contrast, 'normal canine behavior' such as 'barking and running around' does not amount to vicious propensities" (Christopher P. v Kathleen M.B., 174 AD3d 1460, 1461 [4th Dept 2019][internal quotation marks and citation omitted]; see Bloom v Van Lenten, 106 AD3d 1319, 1320 [3d Dept 2013]; Long v Hess, 162 AD3d 1646, 1647 [4th Dept 2018]). Finally, it is well settled that a court reviewing a motion for summary judgment must view the evidence in the light most favorable to the nonmoving party (see Vega v Restani Constr. Corp., 18 NY3d 449, 503 [3d Dept 2012]; Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015]; Winne v Town of Duanesburg, 86 AD3d 779, 780 [3d Dept 2011]; Marra v Hughes, 123 AD3d 1307 [3d Dept 2014]).

In support of the motion for summary judgment, defendant proffered, among other things, the pleadings, and the parties' examinations before trial. Defendant testified that she rescued Roman from Rescuables in Dutchess County. Defendant testified that, prior to the accident, Roman went to obedience schools. Defendant testified that Roman wore a regular collar and was always taken outside on a leash. Defendant testified that Roman had never bitten anyone prior to the subject incident. Defendant testified that Roman was fine with other dogs and never reacted to fireworks. Defendant testified that the incident happened so fast and that her dog "somehow had gotten out the door that [was] totally secure" and that plaintiff "was kicking [Roman] in the head and swearing at him." Defendant further testified that she did not see Roman "bite [plaintiff] until after [she] came out and after [plaintiff] had been kicking [Roman] and swearing at him." Defendant also testified that Roman was not attached to plaintiff when she came out of the

residence and that she was unable to "grab a hold of [her] dog and by the time [she] tried to, that's when [her] dog had grabbed on to the back of [plaintiff's] calf." Defendant testified she was then able to get Roman inside the residence and assisted plaintiff back to his truck.

Plaintiff testified that he was delivering a certified letter to defendant's residence on West Tremont Street in the City of Glens Falls. Plaintiff testified that he pulled up to the residence, grabbed the parcel of mail, exited his vehicle and proceeded to knock on the door. Plaintiff testified that he then looked at his scanner and the letter to be delivered and that "within a split second, [he] saw two eyes in the doorway." Plaintiff testified that "[t]he next thing [he] knew the door had broken open," he was "pinned up on the porch rail between the door and the railing, Roman exited the house and grabbed plaintiff by his leg and then grabbed plaintiff by his other leg "until the owners heard [his] calls for help and came to the door and secured [Roman] back in the house." Plaintiff testified that he was bleeding from both of his legs and was in considerable pain. Plaintiff testified that he did not hear any barking before the dog came through the door. Plaintiff testified that he had never heard barking at the subject address on any of his prior deliveries and had no indication that the people even owned Roman prior to the incident. Plaintiff testified that he had never seen Roman prior to the incident and that none of the other mail carriers had ever said anything about Roman. Plaintiff testified that he was not aware of any individuals who previously witnessed Roman act in this manner prior to the incident. After the accident, plaintiff testified that he went to the hospital where he was given approximately ten sutures and prescribed antibiotics and crutches. The Court finds that defendant has carried her initial burden on summary judgment by establishing that she did not know of any vicious propensities on the part of her dog (see Doerr v Goldsmith, 25 NY3d 1114, 1116 [2015]; Reil v Chittenden, 96 AD3d 1273, 1274 [3d Dept 2012]).

In response, plaintiff tendered his affidavit in opposition, photographs, non-party Samantha David's deposition testimony, and a copy of the dangerous dog disposition from Glens Falls City Court. The Court finds that "[t]he evidence submitted by plaintiff [is] simply insufficient to raise an issue of fact as to whether [Roman] had vicious propensities that were known, or should have been known, to defendant" (Collier v Zambito, 1 NY3d 444, 447 [2004]). Plaintiff has failed to cite a single prior incident as evidence that Roman previously displayed vicious propensities (see Rose v Heaton, 39 AD3d 937, 938 [3d Dept 2007]). Plaintiff relies, in part, on non-party Samantha David's testimony to create an issue of fact. Samantha David testified as follows:

> Q. All right. So he wouldn't be a dog that would walk like off the leash? …
> A. No, he was way too curious on everything else in life.
> Q. Okay. So you didn't want him to get away or get into trouble, so you kept him on a leash?
> A. Yes.
>
> …
>
> Q. Oh, you wouldn't even leave him –
> A. No, we wouldn't leave him alone outside.
>
> …
>
> Q. Now, was that based upon just the dog's temperament, that you wouldn't leave him alone outside, your own concerns, what was it?
> A. No, I just – you know, I just didn't never want to have them outside on their own, you know, It's just who I am. It's the same with – same with my shepherd mix, you know, I don't want to leave her outside by herself either.
> Q. Okay
> A. It's not a fenced in yard, so they could go anywhere.
>
> …
>
> Q. Okay…. [D]id Roman ever seem anxious when people came to the door?
> A. I think a little bit. You know – I don't know. I really don't know what his past was before he was rescued. I don't know.
>
> …

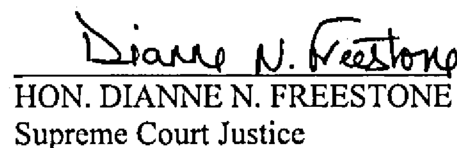
Q. Okay, How would [Roman] react when it was somebody that he wasn't comfortable with?
A. Honestly, I didn't have people that he wasn't comfortable with. I mean, actually, we had a stranger that was supposed to go next door. I guess they thought that that was the same house, because they're the same layout.
Q. Okay.
A. And she literally walked up our back porch and into my kitchen. And he was just like – he jumped up and was licking her, and I was like, who are you?
Q. … The Collar that you would put on Roman, was it just a straight collar or was it a harness type?
A. It was a regular collar, unless we were going on a longer walk, then we would put him on a harness, just so that he wouldn't pull.
Q. Yeah. And so would he occasionally – I experienced this with my dog over the weekend. When you put the regular collar on them, and you go for a decent walk, and they start pulling and they start choking themselves?
A. Yeah.
Q. Would he do that?
A. He would do that, yep.
Q. -- would put the harness on him to keep him from pulling?
A. Yes, and to keep him from choking himself.

Unlike the cases cited by plaintiff herein, there was no evidence that Roman growled or snapped or that defendant previously warned neighbors to stay away because Roman would bite. Plaintiff relies on the fact that the subject attack was allegedly unprovoked. However, the Court of Appeals case cited by plaintiff acknowledged that there was no dispute that the dog's attack in said case was unprovoked; however, the Court of Appeals went on to conclude that the lower court properly granted summary judgment and dismissed the complaint (see Collier v Zambito, 1 NY3d at 447). Although Roman was always taken outside by defendant on a leash, no proof was elicited that he was leashed because the owners feared he would do any harm to their visitors and/or neighbors (see Collier v Zambito, 1 NY3d at 447; see also Illian v Butler, 66 AD3d 1312, 1314 [3d Dept 2009]). There is no support in the record for a finding that defendant kept Roman as a guard dog (see Thurber v Apmann, 91 AD3d 1257, 1258 [3d Dept 2012]). Moreover, there is no evidence that Roman's behavior was ever threatening or menacing (see Collier v Zambito, 1 NY3d at 447). Plaintiff conceded that he had never observed Roman nor even heard him bark before the subject

incident (see Miletich v Kopp, 70 AD3d 1095, 1096 [3d Dept 2010]). Therefore, even when viewing the evidence in a light most favorable to plaintiff, the evidence is insufficient to establish issues of fact regarding Roman's vicious propensities (see Buicko v Neto, 112 AD3d at 1047; see generally Hamlin v Sullivan, 93 AD3d 1013, 1015 [3d Dept 2012]; Campo v Holland, 32 AD3d 630, 632 [3d Dept 2006]). Accordingly, the Court finds that defendant "conclusively demonstrated that [she] lacked knowledge of a vicious propensity on [Roman's] part, entitling [her] to summary judgment dismissing the complaint" (Bloom v Van Lenten, 106 AD3d 1319, 1321 [3d Dept 2013]).

Based on the foregoing, defendant's motion to dismiss plaintiff's complaint in its entirety is hereby granted, without costs. The Court is hereby uploading the original Decision and Order into the NYSCEF system for filing and entry by the County Clerk. Counsel for plaintiff is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing for Saratoga County.

Signed this 1st day of June 2021, at Saratoga Springs, New York.



HON. DIANNE N. FREESTONE
Supreme Court Justice

ENTER

Entered Saratoga County Clerk