

Still v Paws & Rec, Inc.

2023 NY Slip Op 31301(U)

April 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 515396/2021

Judge: Francois A. Rivera

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of April 2023

HONORABLE FRANCOIS A. RIVERA

-----X

MATHEW STILL

Plaintiff,

DECISION & ORDER

Index No.: 515396/2021

-against-

PAWS & REC, INC.

Defendant

-----X

Recitation in accordance with CPLR 2219(a) of the papers considered on the notice of motion filed on December 12, 2022, under motion sequence number one, by plaintiff Matthew Still (hereinafter Still or plaintiff) seeking an order pursuant to CPLR §3212 granting summary judgment in the plaintiff's favor on the issue of liability against defendant Paws & Rec, Inc. (hereinafter defendant) and striking the defendant's affirmative defenses.

This motion is opposed by the defendant.

- Notice of Motion
- Affirmation in Support
- Exhibit A-F
- Statement of Material Fact
- Affirmation in Opposition
- Exhibits 1-9
- Response to Statement of Material Fact
- Memorandum of Law in Opposition
- Affirmation in Reply

BACKGROUND

On June 23, 2021, plaintiff Still commenced the instant action for damages for personal injury by filing a summons and verified complaint (hereinafter the commencement papers) with

the Kings County Clerk's office (KCCO). The verified complaint contains fifty-five numbered allegations of fact in support of three causes of action. The first is for negligence, the second is for negligent hiring and supervision, and the third is denominated as "respondent superior".

The verified complaint as amplified by the bill of particulars alleges the following salient facts. On March 22, 2021, at approximately 1:00 p.m., the plaintiff was inside a public park in the vicinity of Hicks Street and Amity Street, in Brooklyn, New York. At the same date, time and place, an employee of the defendant was handling several dogs (hereinafter the dog handler). The dog handler negligently unleashed the dogs, and the unleashed dogs aggressively ran wild and collided with the plaintiff causing the plaintiff to sustain serious physical injuries.

On October 4, 2021, the defendant joined issue by interposing and filing a verified answer with the KCCO.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]). Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]).

The plaintiff is seeking an order granting summary judgment in plaintiff's favor on the issue of liability and striking the defendant's affirmative defenses. The notice of motion and affirmation in support of same, however, does not specify whether summary judgment is sought on all or some of the cause of action asserted. Furthermore, contrary to the requirements of CPLR 2214, the plaintiff offered no law, facts, or argument in support of the branch of the motion seeking to strike the defendants affirmative defenses. By their failure to specifically explain what they were seeking the motion may be denied on that basis (*Abizadeh v Abizadeh*, 159 AD3d 856, 857 [2nd Dept 2018]).

The second cause of action is for negligent hiring and supervision of the dog handler. The third cause of action, denominated as "respondent superior", is referring to the legal theory of respondeat superior. Respondeat superior is a theory of liability and not a cause of action. Generally, where an employee is acting negligently within the scope of his or her employment, the employer may be liable under the theory of respondeat superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training (*see Ambrose v United Parcel Serv. of Am.*, 143 AD3d 929, 931 [2d Dept 2016]). Here, the verified complaint alleges that the dog handler, was acting within the scope of the dog handler's

employment with the defendant. Such an allegation is a judicial admission which is conclusive of the fact asserted (*Napoli v Breaking Media, Inc.*, 187 AD3d 1026, 1028 [2d Dept 2020]). If the plaintiff was seeking summary judgment on the entire complaint, these facts alone would require denial of the motion.

Assuming, for the sake of argument, that the plaintiff is seeking summary judgment on the first cause of action based on negligence, the following would apply. There is no dispute that the defendant is in the business of dog walking and daycare.

The plaintiff's deposition testimony establishes that on March 22, 2021, at around 1:00 p.m., the plaintiff was walking his dog in a dog park located in the vicinity of Hicks Street and Amity Street, in Brooklyn, New York. The plaintiff unleashed his dog and noticed that an individual that he knew as Stan was handling three dogs. Stan was in the same park and unleashed the three dogs. Thereafter, the unleashed dogs began to go wild running and biting each other. At some point, the unleashed dogs ran at full speed in the plaintiff's direction and collided with his leg injuring him.

The plaintiff contends that ordinary negligence principles apply in accordance with the Court of Appeals decision in *Hewitt v Palmer Veterinary Clinic, PC* (35 NY3d 541 [2020]). *Hewitt* addressed an action in which a woman was injured by a dog while she was in the waiting room of the defendant veterinary clinic. The Court of Appeals held that the vicious propensities notice requirement, typically applicable in an action to recover for injury caused by a domestic animal, did not apply to the veterinary clinic inasmuch as that clinic's agents had specialized knowledge relating to animal behavior and the treatment of animals who may be ill, injured, in pain, or otherwise distressed (*id.* at 548).

Instead, the Court of Appeals applied negligence principles, explaining that veterinarians or other agents of such a practice may—either unavoidably in the course of treatment, or otherwise—create circumstances that give rise to a substantial risk of aggressive behavior (*id.*). Due to their specialized knowledge, the Court of Appeals concluded, veterinary clinics are uniquely well-equipped to anticipate and guard against the risk of aggressive animal behavior that may occur in their practices—an environment over which they have substantial control, and which potentially may be designed to mitigate this risk (*id.* at 549).

The plaintiff contends, among other things, that the *Hewitt* exception to the vicious propensities notice requirement applied because the defendant had specialized knowledge in the handling of dogs. The vicious propensity doctrine, which provides for strict liability against an owner of a domestic animal that causes harm, where the owner knows or should have known of the animal's vicious propensities, has been the law in New York since at least the year 1816 (*Collier v Zambito*, 1 NY3d 444, 446 [2004]). The term “vicious propensity” has become a term of art, having expanded from its ordinary definition to “include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation” (*id.*)

A threshold issue then is whether the plaintiff established by evidence in admissible form that the strict liability standard applies or general negligence principles. If the strict liability standard applies, for the plaintiff to prevail, the plaintiff would have to establish that the dog handler or the defendant had knowledge of the dogs' vicious propensities. This, of course, would call into question precisely what is the vicious propensity that the defendant was aware of. 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*, 1 NY3d at 446).

The plaintiff did not present sufficient evidence to establish that the strict liability standard is not applicable to the instant action. If the defendant's conduct is governed by strict liability principles, there is no dispute that the plaintiff presented no evidence that the defendant had notice of the dogs' vicious propensities, whatever that might be. If ordinary negligence principles apply, the plaintiff did not eliminate all material issues of fact as to whether the defendant breached a duty of care to the plaintiff which proximately caused the plaintiff's injury.

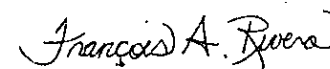
Inasmuch as the plaintiff did not make a prima facie showing of entitlement to summary judgment, the Court need does not reach the sufficiency of the defendant's opposition papers (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

CONCLUSION

The motion by plaintiff Matthew Still for an order pursuant to CPLR §3212 granting summary judgement in plaintiff's favor on the issue of liability against defendant Paws & Rec, Inc. and striking of Paws & Rec, Inc.'s affirmative defenses is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.