30 Misc.3d 1215(A)
Unreported Disposition
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Supreme Court, Kings County, New York.

Asmahan BANNOUT, Plaintiff,
v.
Robert McDANIELS, Defendant.

No. 9920/09. | Jan. 4, 2011.

Attorneys and Law Firms

John P. Bostany, Esq., The Bostany Law Firm, for Plaintiff.

Steven G. Fauth, Esq., for Defendant.

Opinion

YVONNE LEWIS, J.

***1** Defendant, Robert McDaniels, moves for an order, pursuant to CPLR 3212, granting him summary judgment dismissing Asmahan Bannout's complaint.

Background

This is an action to recover damages for personal injuries sustained by Ms. Bannout on February 28, 2009 while visiting her daughter Mona McDaniels and son-in-law, Robert McDaniels, in the McDaniels' home located in Staten Island. Ms. Bannout and her daughter were at the front door saying good-bye when Lola, the McDaniels' dog, ran out of the house striking Ms. Bannout causing her to fall down the exterior landing and four stairs to the ground.

The defendant argues that he is entitled to summary judgment because the Bannout complaint alleges only a cause of action for negligence, not one for strict liability, and, in cases involving domesticated animals, New York law no longer recognizes a cause of action for negligence. The defendant proffers that New York law recognizes only strict liability in these circumstances, and, as Ms. Bannout's complaint fails to allege same, the cause of action sounding in negligence, cannot be maintained as a matter of law. Robert McDaniels alleges that his dog's actions were not vicious or menacing in nature. Rather, he contends that his dog's running out an open door is similar to what any other canine would do. He further alleges that Ms. Bannout failed to offer evidence establishing an awareness on defendant's part of a dangerous propensity of the dog to place others at risk of harm. In further support, Mr. McDaniels also alleges that the plaintiff failed to establish a proximate causal link between her fall and an alleged “insufficient handrail” in McDaniels' home.

Discussion

The Defendant's Motion for Summary Judgment

The proponent of a motion for summary judgment must demonstrate entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 [1985]; *Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century–Fox Film Corp.,* 3 N.Y.2d 395, 404 [1957]). Once such a showing is made, the burden shifts and the party opposing the motion must tender evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which would require a trial or tender an acceptable excuse for his or her failure to do so (*see Greenberg v. Coronet Prop. Co.,* 167 A.D.2d 291 [1990]; *see Zuckerman* 49 N.Y.2d at 557). Parties seeking summary judgment have the burden of establishing their prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of their claim or defense, rather than by pointing to gaps in the plaintiff's proof (*see Nationwide Prop. Cas. v. Nestor,* 6 AD3d 409, 410 [2004]; *Katz v. PRO Form Fitness,* 3 AD3d 474, 475 [2004]; *Kucera v. Waldbaums Supermarkets,* 304 A.D.2d 531, 532 [2003]).

***2** Mr. McDaniels alleges that he is entitled to summary judgment because, among other reasons, the plaintiff failed to offer evidence that the handrail was the proximate cause of the plaintiff's accident. In sum, though, Mr. McDaniels' argument offers conclusory allegations regarding the sufficiency of Ms. Bannout's proof. He misapprehends his burden on his motion for summary judgment. Whether or not the plaintiff has evidentiary support for her allegations is irrelevant for this inquiry. It is Mr. McDaniels, as the movant, who must set forth evidentiary facts effectively removing any questions regarding the handrail's sufficiency, thus entitling him to judgment as a matter of law; anything less requires denial of the motion (*see Coley v. Michelin Tire Corp.,* 99 A.D.2d 795, 796 [1984]). Mr. McDaniels may not

expect to succeed on a prayer for summary judgment by merely pointing to evidentiary gaps in Ms. Bannout's proof (*see Nationwide Prop. Cas.,* 6 AD3d at 410), or offering conclusory allegations, as such allegations may not serve as a predicate for granting summary judgment (*see Zuckerman* at 563; *Coley* at 796). Since the defendant has failed to meet his initial burden of demonstrating entitlement to judgment as a matter of law with regard to the handrail's sufficiency, that burden never shifted to plaintiff to establish the existence of a material issue of fact which would require a trial (*see Greenberg,* 167 A.D.2d at 291). Accordingly, the defendant's motion is denied without regard to the sufficiency of the plaintiff's opposition papers (*see Winegrad,* 64 N.Y.2d at 853; *Hughes v. Cai,* 31 AD3d 385–386 [2006]; *Hanna v. Alverado,* 16 AD3d 624 [2005]).

The Plaintiff's Motion for Summary Judgment

As an initial matter, McDaniels had argued that the plaintiff's complaint must be dismissed, as a matter of law, because Bannout alleged only a cause of action for negligence and New York no longer recognizes such a claim in matters involving domesticated animals. "[A] motion for summary judgment is to be determined upon the facts appearing in the record without regard to technical defects in the pleadings" (*Johnson v. Gaughan,* 128 A.D.2d 756, 756 [1987]). Although the complaint did not directly address the cause of action for strict liability, summary judgment may properly be awarded on the unpleaded cause of action if the proof supports such a cause and the opposing party was not misled or prejudiced (*see Town of Putnam Valley v. Sacramone,* 16 AD3d 669–670 [2005]); *Scalia v. Glielmi,* 200 A.D.2d 615, 616 [1994]; *Deborah Intern. Beauty, Ltd. v. Quality King Distributors, Inc.,* 175 A.D.2d 791, 793 [1991]). As more fully discussed below, Bannout's proof supports a cause of action for strict liability. In addition, McDaniels cannot show that he was misled or prejudiced since he received clear notice that Bannout was moving under strict liability, through her motion for summary judgment, and had ample opportunity to address same in his moving papers; in the alternative, against a finding by this court of "vicious propensities," a component of the strict liability standard enumerated in the cited case law. Accordingly, to the extent necessary, the court deems that the plaintiff's pleadings are amended to conform with the proof (*see Deborah,* 175 A.D.2d at 793; *Weinstock v. Handler,* 254 A.D.2d 165 [1998]; *Dampskibsselskabet Torm A/S v. Thomas Paper Co.,* 26 A.D.2d 347, 352 [1966]).

***3** In support of her motion for summary judgment, Bannout offers the sworn deposition testimony of both the defendant and his wife. During her deposition, defendant's wife, Mona, testified (with emphasis added) as follows:

Q: Did [your mother, the plaintiff] fall after the dog Lola jumped on her?

A: Yes.

Q: Has this dog had a history of jumping on guests in the past before this occurred with your mom?

A: In a loving way, yes.

Q: How often would that occur that she would jump on people?

A: Every time someone—If I allowed her to, every time someone came to the door.

Q: Did Robert McDaniels' father ever come to the house or mother?

A: His mother.

Q: Did the dog ever jump on her?

A: If I allowed her to, yes, but my mother-in-law is not a—she doesn't like animals, so I make sure the dog is being held back.

Q: How do you do that?

A: Me or the kids, we—you know, we hold her back.

Q: How many times together did the dog jump on your mother-in-law before this accident occurred?

A: Any time she came over the house.

During his deposition, as excerpted, Robert McDaniels he discussed Lola's actions when both the defendant's mother and his wife's mother—the plaintiff—visited the home. What is germane to the court's discussion is Lola's reaction when a guest would visit the home. To this end, it is irrelevant whose mother is referenced. Robert McDaniels testified (with emphasis added) as follows:

Q: Prior to this accident, Mona testified that the dog would regularly jump on your mother-in-law; is that accurate?

A: When she was a puppy, yes.

Q: And she said that during the three months prior to the accident, every time your mother-in-law came to the house, the dog would jump on your mother-in-law. Is Mona's testimony true?

A: We would hold the dog down. The dog would want to jump on my mother, but the kids would hold her down not to the point where they were lying on top of her, but they would just hold her back.

According to Court of Appeals and Appellate Division, Second Department case law: "[W]hen harm is caused by a domestic animal, its owner's liability is determined *solely* by application of the rule articulated in *Collier [v. Zambito,* 1 NY3d 444 (2004)]' (*Bard v. Jahnke,* 6 NY3d 592, 599 [2006] [emphasis added])-i.e., 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 (*see Collier,* 1 NY3d at 446–447; *see also Bard,* 6 NY3d at 601 ... Just last year we unanimously affirmed an Appellate Division decision rejecting the notion that a negligence cause of action survives *Collier* and *Bard* (*see Bernstein v. Penny Whistle Toys, Inc.,* 10 NY3d 787 [2008], *affg* 40 AD3d 224 [2007])" (*Petrone v. Fernandez* (12 NY3d 546, 550 [2009]). "In addition, an 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—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier v. Zambito,* 1 NY3d 444, 451 [2004]).

***4** "Generally, even in cases where people are not bitten, but are injured by being jumped upon by a rambunctious dog, the owner thereof will not be subject to negligence liability for failing to restrain the dog, unless there was some prior notice of the particular behavior (*see, Althoff v. Lefebvre,* 240 A.D.2d 604 [1997]; *Nilsen v. Johnson,* 191 A.D.2d 930 [1993]; *Mitura v. Roy,* 174 A.D.2d 1020 [1991]). However, [a] *known* tendency to attack others, even in playfulness, as in the case of an overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant liable for damages resulting from such an act' (*Anderson v. Carduner,* 279 A.D.2d 369, 370 [2001], quoting *Thirlwall v. Galanter,* 66 Misc.2d 88, 90, quoting Prosser, Torts, at 515 [3d ed], emphasis added)" (*Goldberg v. LoRusso,* 288 A.D.2d 257, 259 [2001]).

Through the above-excerpted testimony, the plaintiff has made her prima facie showing of entitlement to judgment as a matter of law. The testimony reveals that the defendant's dog, Lola, had a continuing proclivity to jump on guests since she was a puppy. The uncontroverted testimony of the defendant and his wife, bear out not only that fact, but also that both were fully aware of Lola's propensities and took steps to prevent her from jumping on guests, to wit, "holding her back" themselves or having the children hold the dog down. While Lola's actions were not "vicious" in the sense that she snapped or bit guests, her proclivity for jumping on guests, under the cited case law above, will support the imputation of strict liability to Mr. McDaniels nonetheless. The plaintiff having met her prima facie burden, the burden now shifts to McDaniels to establish the existence of material issues of fact which would require a trial (*see Greenberg,* 167 A.D.2d at 291).

McDaniels, though, fails to establish a triable issue of fact regarding his strict liability for Lola's actions. His reliance on *Hodgson–Romain v. Hunter* (72 AD3d 741 [2010]) and *Dickinson v. Uschold* (11 AD3d 1036 [2004]) is misplaced as both are distinguished on the facts from the instant action. In *Hodgson–Romain,* the defendants presented evidence that they had no knowledge of the dog's propensities whereas in the instant matter, the defendant and his wife testified clearly that Lola had exhibited a propensity to jump on guests since she was a puppy. In *Dickinson,* the injured plaintiff had "extended his hand toward one of the dogs and pulled it away at least twice. When he again extended his hand, the dog jumped up" causing plaintiff's injury. The *Dickinson* court found that, like any other canine, that the dog had simply reacted to the plaintiff's taunts, jumping up in response. According to the uncontroverted testimony in the instant matter, there is no indication that Ms. Bannout was playing with Lola or taunting her such that Lola would jump up onto her in response. What the testimony reveals is that Lola had a propensity to jump on people without the need to be drawn into such behavior.

***5** Accordingly, as the defendant has failed to raise a material issue of fact which would require a trial (*see Greenberg,* 167 A.D.2d at 291), the plaintiff's motion for summary judgment in her favor on the issue of liability is granted, and an inquest on damages will be held at the time of trial. Within 60 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry.

The court, having considered the parties remaining contentions, finds them without merit. All relief not expressly granted herein is denied.

The foregoing constitutes the decision, order and judgment of this court.

Parallel Citations

30 Misc.3d 1215(A), 924 N.Y.S.2d 307 (Table), 2011 WL 237790 (N.Y.Sup.), 2011 N.Y. Slip Op. 50073(U)

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