

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

06-20772-CIV-Highsmith/McAliley

ARLIN VALDEZ-CASTILLO,

Plaintiff,

vs.

BUSCH ENTERTAINMENT CORPORATION,
d/b/a BUSCH GARDENS TAMPA BAY,
BOYKIN MIAMI HOTEL, L.P., BOYKIN
MANAGEMENT COMPANY, LLC, and
CONSERVATION AMBASSADORS, INC. f/k/a
ZOO TO YOU WILDLIFE EDUCATION, INC. f/k/a
WILDLIFE ON WHEELS, INC.,

Defendants.

DEFENDANT BUSCH ENTERTAINMENT CORPORATION'S
MOTION FOR FINAL SUMMARY JUDGMENT AND
SUPPORTING MEMORANDUM OF LAW

Plaintiff is attempting to hold Busch Entertainment Corporation (“BEC”) liable for an allergic reaction she claims she sustained while working as a maid at The Hampton Inn in Miami. Plaintiff alleges she damaged her immune system from exposure to animal dander and excrement in hotel rooms she cleaned. The animals in question were not owned or kept by BEC, but rather were owned and kept by Defendant Conservation Ambassadors, Inc. f/k/a Zoo to You Wildlife Education, Inc. f/k/a Wildlife on Wheels, Inc. (“ZTY”). Judgment as a matter of law pursuant to Fed. R. Civ. P. 56 should be entered on behalf of BEC because it was not an owner or keeper of the animals, and the injuries claimed were not caused by any dangerous propensities of the animals.

I. INTRODUCTION

Between February 9 and February 16, 2004, several BEC employees went to Miami for a public relations promotional visit. Events during the visit included a Miami Heat game, a University of Miami basketball game, a Florida Panthers hockey game, an art show, in-studio appearances at various television channels, radio appearances at various radio stations and an educational outreach program at a public elementary school.¹ BEC contracted with ZTY to bring animals to certain of these events.² ZTY is a California organization that is in the business of wildlife education, training and displaying animals and providing animal handlers for wildlife educational programs.

While on the promotional visit in Miami, BEC employees and ZTY representatives stayed at The Hampton Inn. ZTY sent two representatives who brought with them two baby lemurs, a spider monkey, a macaw and an alligator, all of which are owned by ZTY.³ ZTY has admitted it was the owner and keeper of the animals.⁴ ZTY had the animals shipped from California to Miami on February 9, 2004.⁵ Prior to shipment ZTY had an accredited veterinarian certify that she inspected the animals and that the animals were not showing signs of infectious, contagious and/or communicable disease.⁶

ZTY representatives were at all times responsible for the animals' care and maintenance.⁷ The care and maintenance of the animals were not the responsibility of BEC.⁸ None of the animals stayed in any of the rooms occupied by BEC employees, but rather the animals stayed in

¹ BEC's Responses to Plaintiff's First Set of Interrogatories, Response to Interrogatory No. 3. (Exhibit A)

² The State of California Certificate of Veterinary Inspection obtained by ZTY on February 6, 2004 is attached as Exhibit B.

³ ZTY's Responses to BEC's Request for Admissions, Response to Request No. 1. (Exhibit C)

⁴ ZTY's Responses to BEC's Request for Admissions, Responses to Request Nos. 1 and 2. (Exhibit C)

⁵ ZTY's Responses to BEC's Request for Admissions, Response to Request No. 10. (Exhibit C)

⁶ ZTY's Responses to BEC's Request for Admissions, Responses to Request Nos. 11 and 12. (Exhibit C)

⁷ ZTY's Responses to BEC's Request for Admissions, Response to Request No. 13. (Exhibit C)

⁸ ZTY's Responses to BEC's Request for Admissions, Response to Request No. 14. (Exhibit C)

hotel rooms occupied solely by ZTY employees.⁹ ZTY has admitted it was responsible for the humane handling, treatment, training, transport, feeding, housing care, veterinary care, usage and exhibition of ZTY's animals.¹⁰ Despite this, Plaintiff has sued BEC in strict liability as the owner and keeper of the animals, and in negligence for breaching various duties Plaintiff alleges BEC owes Plaintiff due to BEC's ownership of the animals.¹¹

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is mandated "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56, advisory committee's note on 1963 amendments. "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

⁹ ZTY's Responses to BEC's Request for Admissions, Responses to Request Nos. 15 and 16. (Exhibit C)

¹⁰ ZTY's Responses to BEC's Request for Admissions, Response to Request No. 17. (Exhibit C)

¹¹ All of the negligence allegations contained in Count II of Plaintiff's Amended Complaint arise from Plaintiff's mistaken belief that BEC owned the animals. Plaintiff alleges BEC "owed a duty to handle and keep *its* zoo animals;" "owed a duty to exercise reasonable care to protect the Plaintiff . . . from the reasonably foreseeable exposure to *its* zoo animals and/or their dander, urine, feces, excrement and odor;" and "owed a duty to warn the Plaintiff of any dangerous, unsafe or concealed perils associated with exposure to *its* zoo animals and/or their dander, urine, feces, excrement and odor." (Ad. Com. ¶¶20-22) (emphasis added).

III. DISCUSSION

Florida imposes strict liability on owners and keepers of wild animals for damages to others resulting from the wild animal. *Isaacs v. Powell*, 267 So. 2d 864 (Fla. 2d DCA 1972), *overruled on other grounds by Donner v Arkwright-Boston Mfrs. Mut. Ins. Co.*, 358 So. 2d 21 (Fla. 1978). However, damages can only be imposed against those owning or keeping wild animals, and are generally limited to those resulting from the wild animal's dangerous propensities. *See Restatement (Second) of Torts*, § 507; *see also Isaacs*, 267 So. 2d at 866 (“the owner or keeper of a wild animal is held to a rigorous rule of liability on account of the danger inherent in harboring such animal”). The doctrine of strict liability for wild animals does not apply in this case because BEC neither owned nor kept the animals, and Plaintiff's alleged damages did not result from the dangerous propensities of the animals.

A. BEC Was Not an “Owner” or “Keeper” of the Animals.

Strict liability for the acts of wild animals is imposed only upon the owners and keepers of the wild animals. *Sconza v Martinez*, 683 So. 2d 1115, 1117 (Fla. 4th DCA 1996) (citing *Isaacs*, 267 So. 2d at 866). Those who are not “owners” or “keepers” cannot be subject to the doctrine of strict liability for the acts of wild animals. *See O'Steen v. Kemmerer*, 344 So. 2d 313 (Fla. 1st DCA 1977) (affirming the lower court's holding that the landowner, who was not the animal's owner or keeper, was not liable for damages caused by wild animal without proof of some ownership interest in the wild animal). The animals in question were owned and kept by ZTY, not BEC. BEC contracted with ZTY to provide animals, as well as keepers to maintain the animals, during the trip. There is no genuine issue of material fact as to the ownership of the animals to which Plaintiff was allegedly allergic.

BEC also was not a “keeper” of the animals. This term “has been uniformly defined as connoting either the control or the right to control the thing allegedly ‘kept.’” *Sharp v. Levine*, 528 So. 2d 1369, 1370 (Fla. 3d DCA 1988). In *Sharp*, an owner of an elephant contracted with the defendants to use the defendants’ land and premises. *Id.* The contract specifically provided that the defendants were “not responsible for feeding, watering or maintaining the animals in any manner.” *Id.* Without entitlement to an exercise of control over the elephant, the court was unwilling to impose “owner” or “keeper” liability upon the defendants. *Id.*

Similarly, BEC contracted with ZTY to bring the animals to a series of promotional events, along with representatives from ZTY to keep and maintain the animals. The contract between BEC and ZTY provided that ZTY was responsible for the humane handling, treatment, training, transport, feeding, housing care, veterinary care, usage and exhibition of ZTY’s animals. (*See* Master Services Agreement, previously filed by Plaintiff under seal on August 22, 2006, p. 3, §7(b)). The animals were under the control of the ZTY employees, and stayed in the rooms of the ZTY employees. The animals were not under the control of the BEC employees, and did not stay in the rooms of any BEC employees. There is no genuine issue of material fact on this point -- BEC was not a “keeper” of the animals to which Plaintiff was allegedly allergic. Because BEC was neither an “owner” nor a “keeper” of wild animals, the doctrine of strict liability for wild animals does not apply. Plaintiff’s negligence count, predicated on the mistaken belief that BEC owned the animals, similarly fails. Therefore, Defendant BEC’s Motion for Final Summary Judgment should be granted.

B. Plaintiff's Injuries Were Not the Result of Affirmative Actions by the Animals.

Plaintiff's claims against BEC fail not only because BEC is not the owner or keeper of the animals to which Plaintiff was allegedly allergic, but also because the alleged injuries were not the result of affirmative acts by the animals. Strict liability for damages resulting from the actions of wild animals "is limited to harm that results from a dangerous propensity...." *Restatement (Second) of Torts*, § 507(2). The Comments for § 507 provide some insight on this limitation of liability:

[O]ne who keeps a tame bear upon his premises or leads it along a public highway is liable to anyone whom the bear may maul or bite, even though he has taken every precaution to control it. On the other hand, if the bear, having escaped, goes to sleep in the highway and is run into by a carefully driven motor car on a dark night, the possessor of the bear is not liable for harm to the motorist in the absence of negligence in its custody.

Restatement (Second) of Torts § 507 cmt. e (1977). The example above illustrates the principle that an affirmative or aggressive action by the animal is necessary in order to hold the owner or keeper liable.

While the question of liability for an allergic reaction to a wild animal appears to be one of first impression in this jurisdiction, there is case law that addresses the nature of strict liability statutorily imposed upon dog owners that is a useful comparison.¹² Pursuant to Florida Statute § 767.01, "[o]wners of dogs shall be liable for any damage done by their dogs to a person or to any animal...." In essence, this statute imposes strict liability on a dog owner for the acts committed

¹² In *Isaacs*, the court discussed the majority and minority views relating to liability for owners and keepers of wild animals. 267 So. 2d at 865-866. The court adopted the majority view imposing strict liability upon owners and keepers of wild animals. One reason the court was compelled to adopt such a view was the existence of Florida Statute § 767.04, commonly known as "the dog bite statute," which essentially imposes strict liability upon a dog owner for damages suffered by persons bitten by their dog. The court noted: "It would result in a curious anomaly, then, if we were to adopt the [minority] negligence concept as a basis for liability of an owner or keeper of a tiger, while § 767.04 imposes potential strict liability upon him if he should trade the tiger for a dog." *Isaacs*, 267 So. 2d at 866.

by the owner's dog. See *Jones v. Utica Mut. Ins. Co.*, 463 So. 2d 1153, 1156 (Fla. 1985); see also *Donner*, 358 So. 2d at 23. This interpretation of the statute imposing strict liability on dog owners is consistent with the *Restatement (Second) of Torts'* interpretation of strict liability on owners and keepers of wild animals. Thus, cases involving statutory strict liability of dog owners are instructive in analyzing the liability of an owner or keeper of a wild animal.

For the purposes of practicality, "there must be a limit to the rule of absolute liability [for animals]." *Smith v. Allison*, 332 So. 2d 631, 633 (Fla. 3d DCA 1976). In *Smith*, the plaintiff lost control of his motorcycle when the defendant's dog ran into roadway and he swerved to avoid hitting the dog. *Id.* When the plaintiff sought recovery under § 767.01, a jury returned a verdict in his favor. The appellate court reversed, finding the statute "does not include cases where the dog itself does not inflict any damage." *Id.* at 633-34. The court specifically noted:

Where...the damage results from some physical agency set into motion by a chain of events which may have been triggered by the presence of the dog, absolute liability should not be imposed.

Id. at 634.

Another Florida appellate court took a similar approach in limiting the extension of strict liability to dog owners. In *Rutland v. Biel*, the court held that the statutorily imposed doctrine of strict liability of owners for damage done by their dogs "is not applicable to a situation where the dog takes no affirmative or aggressive action toward the injured party." 277 So. 2d 807, 809 (Fla. 2d DCA 1973). In *Rutland*, the plaintiff sued the defendant under § 767.01 when she tripped and fell over the defendant's dog that was lying on the floor. *Id.* at 808. The court was unwilling to extend the theory of strict liability so far as to allow recovery for an injury based upon the mere presence of a dog.

In the case at hand, Plaintiff allegedly suffered an allergic reaction from the animals' dander and excrement. As both the *Rutland* and the *Smith* courts noted, the mere presence of an

animal should not be enough to trigger strict liability upon the animal's owner or keeper. Thus, even if BEC was the owner or keeper of the animals, which it was not, BEC should not be held liable simply because wild animals were involved in a chain of events that allegedly caused Plaintiff's injuries.

Moreover, Plaintiff never came into any contact, physical or otherwise, with the animals to which she was allegedly allergic.¹³ Her reaction is alleged to be as a result of cleaning the rooms without the animals present. Thus, there were no affirmative or aggressive acts by the animals. As the *Rutland* court noted, without an affirmative or aggressive act liability should not attach. *Rutland*, 277 So. 2d at 809. This is consistent with the *Restatement (Second) of Torts*, § 507, which attaches strict liability for damages resulting from the dangerous propensity of the wild animal. Plaintiff's alleged allergic reaction was not due to the dangerous propensities of the wild animals; rather, the allergic reaction was due to Plaintiff's own immune system, which is something over which BEC lacks any control. Therefore, even if BEC was the owner or keeper of these animals, which it was not, BEC should not be held strictly liable for Plaintiff's alleged injuries because they were not the result of the animals' dangerous propensities or affirmative, aggressive acts.

IV. CONCLUSION

Based on the foregoing facts and authorities, this Honorable Court should find BEC not liable as a matter of law.

WHEREFORE, Defendant Busch Entertainment Corporation respectfully requests this Court to find it is entitled to judgment as a matter of law pursuant to Fed. R. Civ. P. 56, to enter Final Summary Judgment in its favor and for such other relief as the Court deems appropriate.

¹³ Depo. of Arlin Valdez-Castillo 69:14-70:13 (The relevant pages from Plaintiff's deposition are attached as Exhibit D.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 29, 2006, I electronically filed the foregoing Defendant Busch Entertainment Corporation's Motion for Final Summary Judgment and Supporting Memorandum of Law with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **Eric S. Kleinman, Esquire**, Kleinman & Arrizabalaga, P.A., Washington Mutual Bank Building, 150 S.E. 2nd Avenue, Suite 1105, Miami, FL 33131, **John Buchholz, Esquire**, Kelley, Kronenberg, Gilmartin, Fichtel & Wander, P.A., 15600 N.W. 67th Avenue, Suite 204, Miami Lakes, FL 33014, and **Alan L. Landsberg, Esq.**, Bunnell, Woulfe, Kirschbaum, Keller, McIntyre, Gregoire & Klein, P.A., One Financial Plaza, Suite 900, 100 Southeast Third Avenue, Ft. Lauderdale, FL 33394. I further certify that copies of the foregoing documents have been sent via U.S. Mail to the above-named addressees.

s/ Robert L. Blank

Robert L. Blank, Esquire

Florida Bar No. 0948497

E-mail: rblank@rumberger.com

RUMBERGER, KIRK & CALDWELL, P.A.

100 North Tampa Street, Suite 2000

Post Office Box 3390

Tampa, Florida 33601-3390

Telephone: (813) 223-4253

Telecopier: (813) 221-4752

E-Mail: rblank@rumberger.com

Attorneys for Busch Entertainment Corporation