

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL S. DOLAN, JR., et al. : CIVIL ACTION  
v. :  
ROBERT PEARCE : NO. 97-7519

**MEMORANDUM AND FINAL JUDGMENT**

HUTTON, J.

May 18, 1998

Presently before the Court is the Plaintiffs' Request for Judgment by Default (Docket No. 5). For the reasons stated below, the plaintiffs' motion is **GRANTED**.

**I. BACKGROUND**

The plaintiffs are Michael S. Dolan, Sr., and Theresa M. Dolan, husband and wife; Michael S. Dolan, Jr., their minor son; and Robert C. Dolan, also their minor son. The defendant is Robert Pearce ("Pearce"), who lived near the plaintiffs in a West Philadelphia neighborhood, before the plaintiffs moved to New Castle, Delaware.

The plaintiffs allege the following facts. On January 14, 1997, the plaintiffs allowed their pet dog to go outside on their property behind the plaintiffs' home. Pls.' Compl. ¶ 4. Within five minutes, the defendant's two dogs, both pit bulls, approached and attacked the plaintiffs' dog. Id. ¶ 5. Michael S. Dolan, Jr., ("Michael Dolan") opened the door to the

plaintiffs' home to allow the plaintiffs' dog an opportunity to escape, but the defendant's dogs chased the plaintiffs' dog into the plaintiffs' house. Id. ¶ 6. One of the defendant's dogs bit Michael Dolan on the hand, and he responded by kicking the dog. Tr. of 4/14/98 at 13-14. Theresa Dolan took her sons upstairs, and barricaded the staircase to prevent the defendant's dogs from chasing them. Pls.' Compl. ¶ 7. Unfortunately, the plaintiffs were unable to seize their pet dog, which ran to the basement of the house. Theresa Dolan immediately called the police. Id. ¶ 8. While waiting for help to arrive, Theresa Dolan and her two sons listened to the defendant's pit bulls kill their family pet. Id. ¶ 9.

As a result of this attack, the plaintiffs consulted a lawyer. Tr. of 4/14/98 at 19. After learning that the plaintiffs intended to pursue legal remedies, the defendant threatened to "get" the Dolan family. Id.

The plaintiffs filed the instant complaint on December 12, 1997. In their complaint, the plaintiffs allege that the defendant negligently allowed his dogs to enter the plaintiffs' property. Moreover, they contend that the two plaintiff sons suffered emotional disorders arising from the incident. Further, the plaintiffs claim \$845.89 in property damage, and \$400 in costs associated with buying another pet dog. Finally, the plaintiffs seek punitive damages against the defendant, both for

his failure to control his dogs and because he threatened the plaintiffs after they consulted a lawyer.

Although the plaintiffs served their complaint on December 12, 1997, the defendant has not yet responded. On March 27, 1998, the plaintiffs filed the instant motion, requesting that the Court enter a default judgment against the defendant. On April 14, 1998, this Court held a default judgment hearing to determine the validity of the plaintiffs' request.

## **II. DISCUSSION**

### **A. Granting a Default Judgment**

The entry of default and default judgment is governed by Federal Rule of Civil Procedure 55, which reads in pertinent part:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor . . . .

Generally, the entry of default and default judgment is disfavored because it prevents a plaintiff's claims from being decided on the merits. Thompson v. Mattleman, Greenberg, Shmerelson, Weinroth & Miller, No.CIV.A.93-2290, 1995 WL 321898, \*3 (E.D. Pa. May 26, 1995); 10 Wright, Miller & Kane, Federal Practice and Procedure § 2681 (1983).

The court is required to exercise "sound judicial discretion" in deciding whether to enter default judgment. "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when the defendant is technically in default." 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685. The court should consider a number of factors in determining whether to enter default and default judgment, including:

the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; and whether plaintiff has been substantially prejudiced by the delay involved. Furthermore, the court may consider whether the default was caused by a good faith mistake or excusable neglect; how harsh an effect a default judgment might have; and whether the court thinks it later would be obliged to set aside the default on defendant's motion.

Franklin v. National Maritime Union of Am., No.CIV.A.91-480, 1991 WL 131182, \*1 (D.N.J. July 16, 1991), aff'd, 972 F.2d 1331 (3d Cir. 1992) (TABLE), cert. denied, 507 U.S. 926 (1993) (citing 10 Wright, Miller & Kane, Federal Practice and Procedure § 2685 (1983)).

The Third Circuit has condensed those factors into a list of three: (1) prejudice to the plaintiff if default judgment is not granted; (2) whether the defendant has a meritorious defense; and (3) whether the defendant's delay was the result of culpable misconduct. Harad v. Aetna Cas. and Sur. Co., 839 F.2d 979, 982 (3d Cir. 1988); De Bueno v. Bueno Castro, 822 F.2d 416, 149-20 (3d Cir. 1987); Scarborough v. Eubanks, 747 F.2d 871, 875-78 (3d Cir. 1984); United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984); Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653, 656 (3d Cir. 1982); Estate of Menna v. St. Agnes Med. Ctr., No.CIV.A.94-2424, 1994 WL 504442, at \*1 (E.D. Pa. Sept. 14, 1994) (citing Emcasco Ins. Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Hritz v. Woma Corp., 732 F.2d 1178, 1181 (3d Cir. 1984)). A standard of "liberality" rather than "strictness" should be used so that "any doubt should be resolved [against default] judgment so that cases may be decided on their merits." Medunic v. Lederer, 533 F.2d 891, 893-94 (3d Cir. 1976)(quoting Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245-46 (3d Cir. 1951)).

#### **1. Prejudice to the Plaintiffs by Denying the Default Judgment**

The first question is whether denying the plaintiffs' motion for default judgment would prejudice the plaintiffs. Factors which can be considered in determining the existence of prejudice include: (1) loss of available evidence; (2) increased potential

for fraud; and (3) substantial reliance on the judgment. Feliciano, 691 F.2d at 657. "Delay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to [grant] a default judgment." Id. at 656-57. In the instant matter, it does not appear that the plaintiffs will suffer prejudice absent an immediate default judgment. However, given the defendant's failure to respond to the plaintiffs' complaint and subsequent motion, the plaintiffs would be unable to recover absent the entry of a default judgment. Thus, this Court finds that the plaintiffs would be prejudiced if this Court denied the instant motion.

## **2. Will the Defendant Have Meritorious Defenses?**

Next, the Court must determine whether the defendant will have meritorious defenses. "A claim or defense will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff or would constitute a complete defense." Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 869-70 (3d Cir. 1984); accord \$55,518.05 in U.S. Currency, 728 F.2d at 195; Feliciano, 728 F.2d at 657; Farnese v. Bagnasco, 687 F.2d at 764. It is sufficient that the proffered defense is not "facially unmeritorious." Emcasco Insurance Co. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987); Gross v. Stereo Component Sys., Inc., 700 F.2d 120, 123 (3d Cir. 1983). In order to determine whether the defendant would have a meritorious

defense, this Court must consider the validity of the plaintiffs' claims.

**a. Negligence Per Se**

Under Pennsylvania law, a party may state a viable negligence claim against a dog owner for injuries suffered during an attack on that party by the owner's dog. See Groner v. Hedrick, 169 A.2d 302, 303 (Pa. 1961) (finding dog owners negligent for their dog's attack); Clark v. Clark, 215 A.2d 293, 295-96 (Pa. Super. Ct. 1965) (same). The Dog Law of December 22, 1965, 3 P.S. § 460-702 (the "Dog Law") states that it is:

unlawful for the owner . . . of any dog to fail to keep at all times such dog either (1) confined within the premises of the owner, or (2) firmly secured by means of a collar and chain or other device so that it cannot stray beyond the premises on which it is secured, or (3) under the reasonable control of some person . . . .

"An unexcused violation of the Dog Law is negligence per se," and liability attaches where "the violation is a substantial factor in bringing the injuries sustained." Miller v. Hurst, 448 A.2d 614, 618-619 (Pa. Super. Ct. 1982).

In the instant action, the plaintiffs have asserted that the defendant continuously violated the Dog Law by allowing his pit bulls to roam unsupervised throughout the neighborhood. Pls.' Compl. ¶¶ 5, 6; Tr. of 4/14/98 at 4, 6. "Evidence that [the defendant] intentionally allowed his dog to run without restraint

[is] sufficient to make out a prima facie case of negligence." Miller, 448 A.2d at 619. Accordingly, the plaintiffs are entitled to recover damages proximately caused by the defendant's violation of the Dog Law.

**b. Intentional Infliction of Emotional Distress**

Pennsylvania recognizes, but has not officially adopted, Section 46 of the Restatement (Second) of Torts. See Miller v. Peraino, 626 A.2d 637, 640 (Pa. Super. Ct. 1993). The "Restatement contemplates recovery for intentional infliction of emotional distress when a tortfeasor's conduct is directed at a third person." Id. (emphasis added). Pennsylvania law does not consider a dog to be "person" under the Restatement. Instead, a dog is considered "property." Thus, a person cannot recover for intentional infliction of emotional distress where the person witnesses a tortfeasor's conduct directed towards his or her dog. Id.; see Daughen v. Fox, 539 A.2d 858, 864 (Pa. Super. Ct.), appeal denied, 553 A.2d 967 (Pa. 1988) (table) (finding veterinarian's negligent conduct directed to dog, not to owner, thus barring owner's emotional distress claim); but see, Villaume v. Kaufman, 550 A.2d 793, 794 (Pa. Super. Ct. 1988) (allowing jury to decide mental injury claim, where plaintiff and her dog sustained injuries from defendant's dog). Consequently, the plaintiffs cannot recover under an intentional infliction of emotional distress claim, to the extent that claim is based on

their minor sons having witnessed the attack on their pet dog.

### **3. Was Defendant's Conduct Culpable?**

Finally, the Court must examine whether the defendant's conduct was culpable. Culpable conduct is dilatory behavior that is willful or in bad faith. Gross, 700 F.2d at 123-24; Feliciano, 691 F.2d at 657.

In their complaint, the plaintiffs assert that the defendant threatened Michael Dolan, Sr., after the plaintiffs consulted an attorney to discuss their legal remedies. Moreover, the defendant has still not responded to the plaintiffs' complaint or the plaintiffs' current motion. Given the defendant's delay, the defendant's conduct appears culpable.

## **B. Plaintiffs' Damages**

### **1. Compensatory Damages**

The plaintiffs seek \$2701.89 in compensatory damages. First, the plaintiffs spent \$845.89 cleaning their basement as a result of blood stains arising from the attack. This sum includes the cost of replacing the carpet and repainting the walls. Second, the plaintiffs request \$728.00, representing Michael Dolan's medical expenses. Michael Dolan met with Dr. Sherri Landes, a psychologist, who found that, as a result of the attack, Michael Dolan suffered from Adjustment Disorder with Anxious Mood. Finally, the plaintiffs seek \$400 in damages

representing the amount they paid to buy another pet dog. This Court finds that the defendant's violation of the Dog Law was a substantial factor in bringing about these damages. Accordingly, the Court grants the plaintiffs' motion to this extent.

The remaining sum requested by the plaintiffs arises out of Robert Dolan's emotional distress claim. Robert Dolan accrued \$728.00 in medical bills. After the attack, Robert Dolan also met with Dr. Landes, who found that Robert Dolan suffered from Adjustment Disorder with Mixed Emotional Features. As explained above, however, Pennsylvania law does not allow a person to recover for intentional infliction of emotional distress where the person merely witnesses a tortfeasor's conduct directed towards his or her dog. Unlike Michael Dolan, who was a subject of the attack, Robert Dolan's injuries arise solely from his having witnessed the attack on the plaintiffs' dog. Accordingly, the Court denies the plaintiffs' request to this extent.

## **2. Punitive Damages**

Under Pennsylvania law, "[p]unitive damages are appropriate when an individual's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton, or reckless conduct." Bannar v. Miller, 701 A.2d 232, 242 (Pa. Super. Ct. 1997) (citing SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702 (Pa. 1991)). Thus, while:

Punitive damages are not available in cases

involving simple negligence, [they] are available when "the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk." Martin [v. Johns-Manville Corp.], 494 A.2d 1088, 1097 (Pa. 1985)] (quoting Restatement (Second) of Torts, § 500 cmt. a (1979)).

Loque v. Loqano Trucking Co., 921 F. Supp. 1425, 1427 (E.D. Pa. 1996).

When calculating punitive damages, a court must consider: "1) the character of the act, 2) the nature and extent of the harm, and 3) the wealth of the defendant." Kirkbride v. Lisbon Contractors, Inc., 555 A.2d 800, 803 (Pa. 1989). "[A] reasonable relationship must exist between the amount of [a] punitive damages award and the twin goals of punishment and deterrence." Sprague v. Walter, 656 A.2d 890, 929 (Pa. Super. Ct. 1995), appeal denied, 670 A.2d 142 (Pa. 1996) (table). However, no such nexus must exist between the compensatory and punitive damages awarded. Id.

The plaintiffs' allegations are sufficient to support a claim for punitive damages. The plaintiffs contend that the defendant's dogs continuously "terroriz[ed]" the neighborhood. Tr. of 4/14/98 at 4, 17. In fact, the plaintiffs assert that one child was forced to "jump on top of an automobile" to avoid being "physically attacked by [the defendant's] two pit bull dogs." Id. Moreover, the plaintiffs assert that the defendant

threatened them after they sought legal advice. Accordingly, the plaintiffs have shown that the defendant's conduct, both in failing to abide by the Dog Law and through his threats, demonstrates "'reckless indifference to the rights of others.'" Logue, 921 F. Supp. at 1427 (citing Martin, 494 A.2d at 1097; Restatement (Second) of Torts, § 908(2) (1979)). Thus, the Court finds that the plaintiffs are entitled to punitive damages.

The defendant's alleged complete disregard of the Dog Law, the clearly foreseeable injuries resulting from the defendant's misconduct, and the resulting harm demonstrate that the goals of punishment and deterrence would be served with a substantial punitive damages award. Moreover, the defendant's alleged threat favors this result. Given the plaintiffs' allegations, this Court finds that an award of \$20,000 in punitive damages is appropriate.

### **III. CONCLUSION**

This Court grants the plaintiffs' request for a default judgment. Moreover, this Court awards the plaintiffs \$1973.89 in compensatory damages and \$20,000 in punitive damages. However, given Pennsylvania law governing emotional distress claims, the Court denies the plaintiffs' request of \$728.00 to compensate the plaintiffs for Robert Dolan's medical claims.

This Court's Final Judgment follows.

