

Jessop v Elizabeth Fillmore, LLC.
2022 NY Slip Op 34100(U)
December 6, 2022
Supreme Court, New York County
Docket Number: Index No. 151371/2020
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN **PART** **58**

Justice

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JAQUAN JESSOP,

Plaintiff,

- v -

ELIZABETH FILLMORE, LLC., ELIZABETH FILLMORE, 27
WEST 20TH STREET, LLC., DOES 1 TO 10

Defendant.

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INDEX NO. 151371/2020

MOTION DATE 12/08/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

In this action involving injuries allegedly sustained during an attack on plaintiff by defendants' dog, plaintiff moves pursuant to CPLR 3212 for an order granting him partial summary judgment on liability, directing defendants to pay plaintiff through the medical pay provision of their insurance policy, and directing them to provide discovery responses.

Defendants oppose.

I. PERTINENT BACKGROUND

In February 2020, plaintiff commenced the instant action after allegedly being attacked and bitten by defendants' dog, Romulus. In his complaint, he alleges that on February 21, 2019, while he was in premises owned and/or rented by defendants and operated as a wedding dress store, he was bitten by Romulus, a dog with vicious propensities of which defendants were aware. He asserts two causes of action for negligence and a strict liability cause of action (NYSCEF 1).

It is undisputed that although some written discovery has been exchanged, depositions have not yet been held. It is also undisputed that the store was rented by defendant Elizabeth Fillmore, LLC (LLC) from the owner-landlord, defendant 27 West 20th Street, LLC, and that defendant Fillmore is the owner of LLC.

Pursuant to plaintiff's statement of material facts (NYSCEF 53) and defendants' counter-statement of material facts (NYSCEF 68), the only material fact that is undisputed is that Romulus is a domestic animal.

II. ANALYSIS

Plaintiff moves for summary judgment on his strict liability claim against defendants, and submits in support thereof:

- (1) his affidavit, in which he describes the incident, and denies that he acted in any way that would have caused Romulus to attack him (NYSCEF 51);
- (2) an unverified complaint filed in this court in January 2020, in which the plaintiff, Gina Giacomantonio, alleges that she was attacked and bitten by Romulus on February 12, 2019 when she walked by Romulus on the street (NYSCEF 56);
- (3) plaintiff's medical bills related to the incident (NYSCEF 57);
- (4) veterinary records for Romulus (NYSCEF 58); and
- (5) defendants' insurance declaration (NYSCEF 59).

Plaintiff argues that his evidence establishes that Romulus had prior vicious propensities, that defendants knew of them, and that they failed to prevent him from attacking plaintiff (NYSCEF 52).

Defendants deny that Romulus had vicious propensities or that he had previously bitten or attacked anyone before the incident with plaintiff. Fillmore states that she was not present

when Romulus allegedly bit plaintiff, and that the only witness to the incident was plaintiff. She denies that Romulus attacked or bit Giacomantonio, or that the veterinary records reflect that Romulus had any prior incidents or has aggressive or violent tendencies (NYSCEF 64). Counsel argues that plaintiff's evidence is either irrelevant or inadmissible (NYSCEF 66).

As Giacomantonio's complaint was verified only by her attorney, it has no probative value (*Ritzer v 6 E. 43rd St. Corp.*, 47 AD3d 464 [1st Dept 2008]). Moreover, although plaintiff states that he believes that the action was settled, he offers no basis for his belief, and there is no indication in the court's records that the case is no longer active. Even if there was a settlement, it does not constitute an admission of wrongdoing by defendants (CPLR 4547).

The veterinary records are inadmissible as they are uncertified (*Natera v Veloz Livery Rentals, Inc.*, 206 AD3d 428 [1st Dept 2022]), and, in any event, do not reflect any prior aggressive or violent incidents by Romulus. While plaintiff claims that the records reflect that Romulus was aggressive or was prescribed medication for his behavior, he does not cite to anything specific in the records other than providing page numbers, and he submits no affidavit from anyone with specialized knowledge as to either animal behavior or medication.

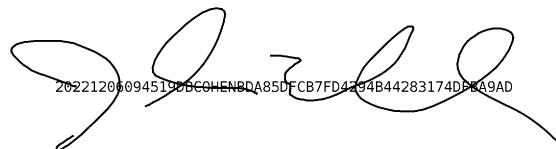
Essentially, at this juncture, plaintiff relies on his own version of the incident, while Fillmore denies that it occurred as described by plaintiff, and neither of them has had his or her story questioned under oath at a deposition. Thus, to the extent that plaintiff's affidavit, by itself, is sufficient to establish his *prima facie* burden, Fillmore's affidavit is sufficient to raise a triable issue. In light of this result, plaintiff's motion for an order directing a payment from defendants' insurance policy is denied.

Plaintiff's application for an order compelling discovery responses is granted to the extent of directing the parties to appear for a compliance conference.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED, that the parties appear for a compliance conference on January 24, 2022 at 10 am, in person, at 71 Thomas Street, Room 305, unless they submit a proposed conference stipulation by 3 pm on January 23, 2022 by email to cpaszko@nycourts.gov and ahile@nycourts.gov.



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DAVID B. COHEN, J.S.C.

12/6/2022

DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE