

**Veras v Murphy**

2013 NY Slip Op 34160(U)

August 7, 2013

Supreme Court, Rockland County

Docket Number: 032553/2012

Judge: Margaret Garvey

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND  
-----X

JOSE VERAS,

*Plaintiff,*

**DECISION AND ORDER  
(Motion # 1)**

*-against-*

Index No.: 032553/2012

DENNIS A. MURPHY and SABRINA FIGUEROA,

*Defendants*  
-----X

*Margaret Garvey, J.S.C.*

The following papers, numbered 1 to 3, were considered in connection with Defendant DENNIS A. MURPHY's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in favor of that defendant on the issue of liability, and for such other and further relief as this court deems just and proper:

<b><u>PAPERS</u></b>	<b><u>NUMBERED</u></b>
NOTICE OF MOTION/AFFIRMATION OF SAMI P. NASSER, ESQ. DATED APRIL 5, 2013 IN SUPPORT/EXHIBITS (A-I)	1
AFFIRMATION OF ALAN JAY BINGER, ESQ. DATED MAY 22, 2013 IN OPPOSITION/ AFFIDAVIT OF JOSE VERAS DATED APRIL 29, 2013/AFFIDAVIT OF KEVIN FRANK DATED MAY 14, 2013/AFFIDAVIT OF FRANCISCA CAPELLAN DATED APRIL 29, 2013/AFFIDAVIT OF LINO CAPELLAN DATED APRIL 24, 2013/AFFIDAVIT OF RAMONA CAPELLAN DATED APRIL 24, 2013/AFFIDAVIT OF LISANDRO CAPELLAN DATED APRIL 29, 2013/ AFFIDAVIT OF LISSETTE CAPELLAN DATED APRIL 29, 2013/EXHIBITS (A-G)	2
REPLY AFFIRMATION OF SAMI P. NASSIR, ESQ. DATED JUNE 10, 2013	3

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff with the filing of the Summons and Complaint on May 14, 2012. Defendant DENNIS A. MURPHY states in his moving papers that "[i]ssue was joined by service of defendant, MURPHY's Answer on or about July 11, 2012." The

Court will note that the July 11, 2012 Answer of Defendant DENNIS A. MURPHY attached as part of Exhibit A of the moving papers may have been served on Plaintiff, but it has not been filed with the Court as it is never been e-filed through the NYSCEF system. However, the Court will note that this issue was not raised by Plaintiff in his opposition papers so the Court will direct that Defendant DENNIS A. MURPHY immediately e-file his July 11, 2012 Answer by uploading it to the NYSCEF system.

Plaintiff's case stems from an incident which occurred on September 7, 2011, when Plaintiff was walking past the house owned by Defendant DENNIS A. MURPHY (absentee/out-of-possession landlord) and occupied by Defendant SABRINA FIGUEROA (tenant/dog owner). Plaintiff alleges that the dog owned by Defendant FIGUEROA ran out of the house, attacked and bit him, causing injuries.

According to Plaintiff's complaint, "Defendant DENNIS A. MURPHY was negligent in permitting his tenant to harbor on said premises a dog which he knew, or in the exercise of reasonable care, should have known, had vicious propensities; in failing to take reasonable steps to have the dog removed from said premises; in failing to take measures to safeguard plaintiff from being attacked by said dog; in failing to take measures to restrain said dog; in failing to control said dog; in permitting the co-defendant to remain on said premises when she harbored a dog of vicious propensities; in failing to protect the plaintiff from being attacked by said dog; in failing to provide safe ingress to, and egress from, said premises; and in exposing plaintiff to an unreasonable risk of harm."

Defendant DENNIS A. MURPHY filed a Notice of Motion (Motion # 1) seeking an Order granting summary judgment on the issue of liability, arguing that he is not liable to Plaintiff for his injuries. Defendant DENNIS A. MURPHY argues that he did not have any prior knowledge of the dog's vicious propensities, had never received any complaints regarding the dog's behavior, and the lease between Defendant DENNIS A. MURPHY and Defendant SABRINA FIGUEROA did not allow for pets. Further, Defendant DENNIS A. MURPHY testified at his

Examination Before Trial (hereinafter "EBT") that he had been to the premises a few times over the two years prior to the incident and was not even aware that Defendant SABRINA FIGUEROA owned a dog, was not aware of any incidents involving dog bites with her dog, or any vicious propensities of her dog. Defendant DENNIS A. MURPHY specifically testified that on one occasion when he was at the home, he observed a pit bull in a cage inside the home and Defendant SABRINA FIGUEROA told him she was dog sitting for a friend.

Plaintiff opposes the instant motion, and provides several affidavits in support of said opposition. Plaintiff argues that Defendant DENNIS A. MURPHY knew, or should have known, that a dog was being harbored on the premises. According to Plaintiff, Defendant DENNIS A. MURPHY's own admission that he observed a pit bull in a cage in the home once despite the lease terms stating no pets allowed should have raised his suspicions at that point, and raises an issue of fact as to whether he knew, or should have known, that a dog was being harbored on the premises. Additionally, Plaintiff provides the affidavit of the mailman who states that the dog was barking in the front window of the home almost every time he went to deliver mail and anyone who went to the home would have to know there was a dog living in the home. Defendant DENNIS A. MURPHY testified during his EBT that he was at the home a few times over the two years prior to the accident to do repairs and affidavits of various family members of Plaintiff state that Defendant DENNIS A. MURPHY was at the home more often than that.

Further, on the issue of vicious propensities, Plaintiff argues that there is a question of fact as to whether Defendant DENNIS A. MURPHY knew, or should have known, that the dog had vicious propensities, based on the affidavit of the mailman, as well as the numerous affidavits of Plaintiff's family members, and Plaintiff himself, who all describe the dog as constantly threatening, menacing, barking, etc... Additionally, the mailman describes an incident a few weeks before the incident in this matter where the dog got out of the home and allegedly attacked him, biting him in the foot. According to the affidavit of the mailman, the

dog would be barking wildly in the front window and banging on it like he wanted to attack him most of the time he would deliver the mail. According to Plaintiff, the affidavits submitted are sufficient to raise a triable issue of fact as to whether Defendant DENNIS A. MURPHY had knowledge that Defendant SABRINA FIGUEROA was harboring a dog in her rented premises and that Defendant DENNIS A. MURPHY knew, or should have known, that the dog had vicious propensities.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. [*Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)]. The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. [*Lacagnino v. Gonzalez*, 306 A.D.2d 250 (2d Dept. 2003)]. However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. [*Gonzalez v. 98 Maq Leasing Corp.*, 95 N.Y.2d 124 (2000), citing *Alvarez*, supra, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851 (1985)]. Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. [*Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)].

Where a plaintiff seeks to recover against a landlord under a theory of strict liability for a dog bite, the plaintiff must demonstrate that the landlord: (1) had notice that the dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities; and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog. [*Sarno v. Kelly*, 78 A.D.3d 1157 (2d Dept. 2010); *Jones v. Pennsylvania Meat Market*, 78 A.D.3d 658 (2d Dept. 2010); *Madaia v. Petro*, 291 A.D.2d 482 (2d Dept. 2002); *Bemiss v. Acken*, 273 A.D.2d 332 (2d Dept. 2000)].

In this matter, Defendant DENNIS A. MURPHY came forward with sufficient evidence to show his entitlement to judgment as a matter of law with his sworn testimony that he did not know that his tenant had a dog, and did not know of any vicious propensities with the dog. In opposition, Plaintiff sufficiently raised questions of fact with the affidavit of the mailman and the affidavits of the various family members, who all testified under oath that the dog was seen almost daily barking and crashing against the front window of the house anytime someone walked by or went to the house, and further that Defendant DENNIS A. MURPHY had been at the house more often than just a few times. While Defendant's counsel states that the discrepancies between the various affidavits regarding how often Defendant DENNIS A. MURPHY was at the home should cause the Court to afford them no weight, the inconsistencies between the statements of Defendant DENNIS A. MURPHY and the various affidavits of Plaintiff and Plaintiff's family members raise credibility issues that cannot be determined on papers alone, and must be left for a jury.

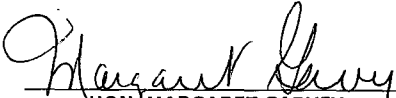
Accordingly, it is hereby

**ORDERED** the Notice of Motion filed by Defendant DENNIS A. MURPHY is denied; and it is further

**ORDERED** that counsel for the parties shall appear for a previously scheduled pre-trial conference on **MONDAY, AUGUST 12, 2013 at 9:15 a.m.**

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York  
August 7, 2013

  
HON. MARGARET GARVEY  
Justice of the Supreme Court