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SHORT FORM ORDER

INDEX No. 10-43090
CAL. No. 12-023950OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-7-13
ADJ. DATE 4-4-13
Mot. Seq. # 002 - MotD

---X

JAMES E. VAN AUKEN,

Plaintiff,

- against -

ROBIN BORY and LAKELAND GARDEN ASSOCIATES,

Defendants.

---X

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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-10 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11-18; Replying Affidavits and supporting papers 19-20; 21-22; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendant, Lakeland Garden Associates, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that it bears no liability for the occurrence of the incident, is denied as to the cause of action for strict liability, and is granted as to the cause of action for common law negligence.

James E. Van Auken alleges that the defendants were negligent in causing and permitting the dog owned by Robin Bory, who resided at Lakeland Garden Associate's premises pursuant to a rental agreement, to bite him on the left arm on July 31, 2010, outside the defendant's apartment located at 195 Lakeland Avenue, Sayville. Causes of action premised upon the defendants' negligence and strict liability have been pleaded.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman***

v Twentieth Century-Fox Film Corporation, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]).

The defendant Lakeland Gardens Associates seeks summary judgment dismissing the complaint on the basis that the proximate cause of the dog bite injury the plaintiff sustained was due to the failure of the owner of the dog, defendant Robin Bory, to secure her dog, and was not due to the failure of Lakeland Garden to exclude the dog from its building where Bory rented. In support of this application, the moving defendant has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant Lakeland's answer with a cross claim against Robin Bory, the plaintiff's unverified bill of particulars; and signed and certified transcript of the examination before trial of James Van Auken, and the unsigned but certified transcript of Robin Bory with proof of service pursuant to CPLR 3116, both dated January 24, 2012.

James Van Auken testified to the extent that on July 31, 2010, at about 11:45 a.m., when he left his apartment at 207 B Lakeland Avenue, Sayville, and was walking on the sidewalk to the parking lot to get to his car, he was attacked and bitten by a dog which was with two women who were standing to the side of the sidewalk in front of 195 Lakeland Avenue. The dog was on a leash and did not bark at him. He then testified that he never saw the leash but maybe assumed it. Van Auken was about eight feet from the two women, and had walked about one foot past them, looking toward the parking lot as he walked, when he felt a heavy weight and realized that his left arm was up in the air with a dog hanging on his arm by its mouth for about ten seconds. He heard screaming. He fell and then got himself up. The dog had been pulled away and was taken into an apartment on the leash by the two women. A woman on the balcony above threw him a towel and called 911. He testified that his arm was pretty torn up from his wrist to his biceps area. He did not know the women. About five or six months after the incident, he saw the dog being walked in the parking lot area of the apartment complex. Another time he saw the dog being walked on Tariff Street, which intersects Lakeland Avenue. After the incident, he learned that the dog had bitten a woman, Nancy Scopo, another resident at the complex at 207 A, about three to six months prior to his being bitten, and that she had reported the incident to the superintendent at the complex and filled out paper work. He reported his incident to the superintendent of the building sometime after the incident.

Robin Bory testified to the extent that on the date of the incident she was residing at 195 Lakeland Avenue, Apartment 1D, Sayville, at Lakeland Gardens for over a year, pursuant to a lease signed on March 12, 2010, with Steve Hirsch, the owner of the complex. She did not fill out an application. At the time, she

had two children living with her, and a fawn boxer named Tango, as well as a cat. Tango was three and a half years old at the time, and she owned it since it was eight months old. She trained the dog herself. She had no concern about the dog's behavior. It would bark at people who came to her home, but it did not growl, snarl, or jump on anyone. She walked the dog on a leash on a daily basis about five or six times a day. She had the dog euthanized because she has two children and because the dog bit someone. She heard of the name "Nancy Scopo, and was not familiar with her being bitten, and stated that she never received paperwork from her. Prior to this incident, she had words with Nancy Scopo because Nancy complained that she did not pick up her dog's waste. She told Nancy that she didn't because there were no doggie bags at the complex. After that, she heard people saying that Nancy Scopo said Bory's dog bit her. She never confronted Nancy about it.

Bory continued that on July 31, 2010, around 11:30 a.m., she had taken her dog Tango out for a walk and that he was wearing a harness with a four foot leash attached. She walked him right next to her, always on her right side. There was a concrete sidewalk in front of her apartment, running parallel to Lakeland Avenue, accessed from a walkway from the front door of her building. She had just walked out onto the walkway and stopped on the sidewalk to wait for her daughter. The dog was standing on the grass just before the road to her right side, sitting on all fours, touching her side. He weighed about fifty-five pounds. She had been waiting for about four minutes for her daughter's return. While she was waiting, she saw no one walking, including the plaintiff. She was looking to her left, and the only person she saw was her daughter when she came walking towards her. The dog just jumped up and grabbed the plaintiff's left arm for about ten to twenty seconds. She pulled back on the harness which pulled the dog off of the plaintiff. The plaintiff was to her right. His arm was bleeding profusely. She thought the closest the plaintiff was to her was about three feet during the incident. The parking lot was about thirty feet away, and he was walking toward his vehicle at the time of the incident. About five minutes after the incident, she called Mike Silva, the superintendent at the complex, to advise him what happened. A couple of days later, Mike called her and told her to get rid of the dog, but she told him "No." She had a muzzle which she used on the dog after it bit the plaintiff, but never used it before the incident, as Mike Silva, told her to use the muzzle after the incident. About a week and a half after the incident, she knocked on the plaintiff's door and spoke with him.

Mike Silva testified to the extent that at the time of the incident, he was employed as the superintendent property manager by Steven Hirsch, the owner of Lakeland Garden Associates, an apartment complex. He leased apartments to applicants, who were not required to provide any details or information regarding any pets or animals, and no interviews of the animals were done. The complex was animal friendly. Robin Bory moved into the complex after he started working there. He stated that she had a boxer. On an occasion when he had to go to her apartment, he didn't want to say the dog growled, but continued that dogs do run to the door and run around. He heard the dog jump on the door. Once, they had to put the dog in another room before he could come in. After he was there, he did not hear the dog bark, growl, or jump. When he saw Robin walking the dog, there was nothing that seemed out of the ordinary. Once he saw the dog interacting with another dog, but he never saw the defendant's dog growl, bark, or bite during the interaction. He continued that the defendant eventually moved out because Steven Hirsch wanted her to put a muzzle on the dog after the incident. He helped her move out of her apartment over a two day period. He did not witness the incident wherein the plaintiff was bitten, but was notified by the defendant about it after it happened. The incident wherein the plaintiff was bitten was the first complaint they had received about the dog. He knew of no incident involving Nancy Scopo.

The plaintiff has submitted the affidavit of Nancy Scopo who averred that on May 10, 2010, she resided at 207 Lakeland Avenue, Apartment 4A, Sayville, part of the Lakeland Garden Apartment complex. At approximately 10:00 a.m., she returned home and parked her car in a designated parking spot within the south parking lot at Lakeland Gardens. As she was getting out of her car, she observed Robin Bory sitting in a parked SUV approximately fifteen feet from her own car. The hatch of Robin's SUV was open, and she could see both Robin and her boxer inside. As she walked from the driver's side to the passenger side of her vehicle, with her back to Robin's vehicle, she suddenly felt a sharp pain in her right hand. When she looked down, Robin's boxer was there and had bitten her on her hand, which was bleeding quite a bit. At that point, Robin pulled her dog back and started to apologize. Scopo continued that Robin appeared to be slurring her words and staggering around and asked her not to call the police. She agreed not to, but immediately went to Michael Silva and reported that she had just been bitten by Robin's dog. She stated that Michael told her that he would speak to Robin about the situation.

STRICT LIABILITY

To recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities (*see* ***Bard v Jahnke***, 6 NY3d 592, 815 NYS2d 16 [2006]; ***Collier v Zambito***, 1 NY3d 444, 448, 775 NYS2d 205 [2004]; ***Christian v Petco Animal Supplies Stores, Inc.***, 54 AD3d 707, 708, 863 NYS2d 756 [2d Dept 2008]; ***Claps v Animal Haven, Inc.***, 34 AD3d 715, 716, 825 NYS2d 125 [2d Dept 2006]; *see also* ***Palumbo v Nikirk***, 59 AD3d 691, 874 NYS2d 222 [2d Dept 2009]).

Knowledge of vicious propensities may be established by proof of a dog's attacks of a similar kind of which the owner had notice, or by a dog's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm (*see* ***Bard v Jahnke***, supra, citing ***Collier v Zambito***, supra). Factors to be considered in determining whether an owner has knowledge of a dog's vicious propensities include 1) evidence of a prior attack, 2) the dog's tendency to growl, snap, or bare its teeth, 3) the manner of the dog's restraint, 4) whether the animal is kept as a guard dog, and 5) a proclivity to act in a way that puts others at risk of harm (*see* ***Collier v Zambito***, supra; ***Galgano v Town of N. Hempstead***, 41 AD3d 536, 840 NYS2d 794 [2d Dept 2007]).

New York recognizes a cause of action which imposes strict liability (no proof of negligence necessary) upon owners for injuries inflicted by their vicious dogs, the owners having knowledge thereof and viciousness being defined as prior bites and/or mischievous propensities (***Nardi et al v Gonzalez,*** 165 Misc 2d 336 [City Ct of New York, Yonkers 1995]). Knowledge of vicious propensities may be established by proof of a dog's attacks of a similar kind of which the owner had notice, or by a dog's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm (*see* ***Bard v Jahnke***, *supra*, citing ***Collier v Zambito***, *supra*).

With respect to the liability for a domestic animal, such as a dog, 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***, *supra*). "The owner of a domestic animal who either knows or should have known of an animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (***Collier v Zambito***, *supra*).

In ***Anderson v Carduner,*** 279 AD2d 369, 720 NYS2d 18 [1st Dept 2001], the court vacated the lower court's dismissal of the complaint finding that whether the injury caused when the dog rose up on plaintiff was reasonably foreseeable based on past behavior of the dog was an issue of fact to be determined by the trier of fact. 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.

In the case at bar, the plaintiff has raised factual issues concerning whether defendant's dog Tango, a fifty-five pound boxer, had a propensity for dangerous or ferocious behavior, or had a proclivity to act in a way that put others at risk of harm by jumping on people or biting them. While the plaintiff and Nancy Scopo claim that Tango bit Scopo prior to the subject dog bite involving the plaintiff, the defendants claims they know nothing about it. Michael Silva and Robin Bory denied receiving a prior complaint about the dog biting Scopo. Thus, there are credibility issues and factual issues which preclude summary judgment on the issue of strict liability, and defendant's prior knowledge of a dangerous behavior which would put others at risk of harm from Tango. These factual issues preclude summary judgment (*see* ***Bannout v McDaniels***, 30 Misc3d 1215(A); 924 NYS2d 307 [Sup Ct, Kings County 2011]).

Accordingly, summary judgment dismissing the cause of action premised upon strict liability as asserted against Lakeland Gardens Associates is denied.

COMMON LAW NEGLIGENCE

In New York, to establish a prima facie case of negligence, a plaintiff must prove (1) that the defendant owed a duty to plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup Ct Nassau County 2006]).

Although the First and Second Departments of the Appellate Divisions of the Supreme Court of New York have allowed recovery for injury caused by domestic animals based on common-law negligence even in the absence of any proof of the owner's knowledge of prior vicious propensities, the Court of Appeals of New York holds that recovery for injuries caused by domestic animals may proceed only under strict liability standards and not on a common-law negligence theory (***Suchdev v Singh,*** 2006 NY Misc Lexis 3699, 236 NYLJ 105 [Sup Ct, Queens County 2006]). A cause of action for ordinary negligence does not lie against the owner of a domestic animal which causes injury. Rather, the sole viable claim is for strict

liability, and to establish such liability, there must be evidence that the animal's owner had notice of its vicious propensities. In the absence of such proof, there is no basis for the imposition of strict liability (***Alia v Florina et al,*** 39 AD3d 1068, 833 NYS2d 761 [3d Dept 2007]).

Historically, the Second Department has rejected attempts by plaintiffs to invoke a common law negligence theory as a basis of liability for a dog bite, the explanation being that liability is not dependent upon proof of negligence in the manner of keeping or confining the animal, but instead is predicated upon the owner's keeping of an animal despite knowledge of the animal's vicious propensities (*see* ***Ortiz v Bonacquisto,*** 2005 NY Misc Lexis 3363, 233 NYLJ 110 [Sup Ct, Putnam County 2005]; *see also* ***Roupp v Conrad,*** 287 AD2d 937, 731 NYS2d 545 [3d Dept 2001]***; Plennert v Abel,*** 280 AD2d 960, 719 NYS2d 918 [4th Dept 2001]***; Smith v Farner, Lynch v Nacewicz,*** 126 AD2d 708, 511 NYS2d 121 [2d Dept 1987]). In ***Suchdev v Singh,*** 2006 NY Misc Lexis 3699, 236 NYLJ 105 [Sup Ct, Queens County 2006]), the common law negligence claim was dismissed because recent judicial precedent held that recovery for injuries caused by domestic animal could proceed only under strict liability standards.

"Absent any violation of a statutory duty, it is well settled that one who keeps a vicious dog with knowledge of its vicious nature is presumed negligent if he does not keep the dog from injuring others. A vicious nature includes, biting, jumping on people, and running at large in a roadway. Conversely, lack of knowledge of a vicious nature is a complete bar to recovery since a plaintiff may not establish facts from which an inference of negligence may be drawn. The rule is apparently grounded in concepts of foreseeability and notice. Violation of a rule of an administrative agency or of an ordinance of a local government is some evidence which the jury may consider on the question of defendant's negligence. Under New York law, where a statute imposes a duty, violation thereof constitutes negligence, and obviates the need to prove the elements of common law negligence. Liability results where the injury is the very occurrence the statute is designed to prevent and the victim is a member of the protected class, provided proximate cause is also shown." (***Ayala et al v Hagemann et al,*** 186 Misc2d 122, 714 NYS2d 633 [Sup Ct, Richmond County 2000]). In ***Petrone v Fernandez et al,*** 2009 NY Slip Op 4694, 2009 NY Lexis 2035 [2009], the court held that "When harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule of strict liability for harm caused by a domestic animal whose owner knows or should have know of the animal's vicious propensities." The court further stated that "[a] defendant's violation of a local leash law is irrelevant in a claim of liability for harm caused by a domestic animal because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability."

Before a landlord of a building in which a pet lives may be held strictly liable for an injury inflicted by the animal, a plaintiff must establish both (1) that the animal had vicious propensities, and (2) that the defendant knew or should have known of the animals propensities (***Carter v Metro North Associates***, 255 AD2d 251, 680 NYS2d 239 [1st Dept 1998]). The first applicable standard in dog bite cases is whether the defendant had any knowledge of the dog's vicious propensities prior to the attack. A vicious propensity does not have to be shown necessarily by an actual bite, but even knowledge of a particular dog baring its teeth or the posting of a "Beware of Dog" sign outside a property might suffice. There could certainly be circumstances where, although a dog has not yet bitten a person, its vicious nature is apparent. A landlord

or out-of-possession landlord must know, or should have know that the dog had vicious propensities before liability can attach to the landlord (*see* ***Herbin v Henrich***, 24 Misc3d 1220 (a), 897 NYS2d 670 [Sup Ct, Queens County 2009], citing ***Dykeman v Heht***, 52 AD3d 767, 861 NYS2d 732 [2d Dept 2008]).

In the instant action, there is no claim that a statute has been violated by the moving defendant. Here, there are factual issues concerning notification to Michael Silva of Lakeland Gardens of the defendant Bory's dog biting Nancy Scopo in the parking lot of the complex on May 10, 2010. Thus, a factual issue exists as to whether or not Lakeland Garden Associates, as landlord, had prior notice of the dog's vicious propensity and to whether or not the defendant is strictly liable to the plaintiff.

In view of the foregoing, summary judgment dismissing the cause of action premised upon common law negligence is granted.

Dated: July 22, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION