SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. DANIEL PALMIERI, J.S.C.

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DAVID ROCKITTER and IVY ROCKITTER, **TRIAL/IAS PART 16**

Plaintiffs, **Index No.: 606693-15**

-against- **Mot. Seq. 001**
Mot. Date:2-14-17
Submit Date: 2-14-17

DENISE BUCKOWITZ and T.J. BUCKOWITZ,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 12-21-16.....1
Affidavit in Opposition, dated 2-6-17.....2
Reply Affirmation, dated 2-13-17.....3

This motion by the defendants pursuant to CPLR 3212 for an order granting them summary judgment and dismissing the complaint is denied.

This is a dog-bite case stemming from an incident that occurred on September 4, 2015, at approximately 7:00 a.m. on residential premises owned by the plaintiffs in Wantagh, New York. According to plaintiff David Rockitter, he walked outside and was on the entryway of his home when he was attacked by a pit bull dog, later identified as Bruno. It is undisputed that Bruno lived across the street with a mother and her adult son, the defendants herein, together with the son's sisters and a friend of the mother's. Plaintiff testified that at the time of the attack he saw the dog on his front lawn and the dog then ran up and bit him on the leg in three places, causing the injuries of which he

complains. Plaintiff then ran back into his house.

He further testified that five minutes after the incident he was approached by defendant T.J. Buckowitz (T.J.), who told him that the dog had been abused by a prior owner, and had been trained to fight. Plaintiff could not recall the exact words, stating that defendant's statement was "something along those lines." In plaintiffs' Bill of Particulars they claimed that a foster child in defendants' house had abused the dog, but plaintiff testified that he didn't know if the person who had abused the dog was that child or a former owner, and was unaware of when the former owner had lived in the house.

Defendant Denise Buckowitz testified, in substance, that T.J. bought Bruno when the dog was four weeks old, and that she had never witnessed Bruno acting in an aggressive manner, that he never had bitten any one, and that he was "fine" with two other dogs living in the house. T.J. testified that he had purchased the dog from a breeder, and was the only person in possession of Bruno from the time of purchase until the subject occurrence. The dog had been taken for obedience training, his last session having been "a couple of months" before the incident. The dog was kept in the basement and was allowed outside within a fenced-in area, but on the day of the attack the gate had been left open and when T.J. was taking him outside he ran out through that gate. T.J. ran after the dog to come back to him, but saw him run across the street and bite the plaintiff once. According to T.J., the plaintiff went back inside but came out again while T.J. was attempting to secure the dog, at which time Bruno bit the plaintiff again. T.J. testified that he had apologized, and told plaintiff that the dog had never done

that before.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212 (b). This burden cannot be met simply by demonstrating that there are gaps in the adversary's case or that a key factual claim cannot be established by the motion opponent. *See River Ridge Living Center, LLC v ADL Data Systems, Inc.*, 98 AD3d 724 (2d Dept. 2012); *see also Calderone v Town of Cortlandt,* 15 AD3d 602 (2d Dept. 2005). In negligence cases, there may be more than one proximate cause of the injury-causing occurrence (*Lopez v Reyes-Flores,* 52 AD3d 785 [2d Dept. 2008]), and thus the proponent of the motion must establish freedom from comparative negligence as a matter of law. *Pollack v Margolin,* 84 AD3d 1341 (2d Dept. 2011). Absent this initial showing, the court should deny the motion, without passing on the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If such a *prima facie* case is made, the burden shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

The court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for

summary judgment is not to resolve issues of fact, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993). Determinations regarding credibility are not to be made. *Guadalupe v New York City Trans. Auth.,* 91 AD3d 716 (2d Dept. 2012).

Further, it is well settled that in order to be held liable for injury caused by an animal, its owner must have had some prior knowledge that it had vicious tendencies. *See, e.g., Collier v Zambito,* 1 NY3d 444, 447 (2004); *Clark v Heaps,* 121 AD3d 1384 (3d Dept. 2014); *Egan v Hom,* 74 AD3d 1133, 1134 (2d Dept. 2010); *Palumbo v Nikirk,* 59 AD3d 691, 692 (2d Dept. 2009); *Earl v Piowaty,* 42 AD3d 865, 866 (3d Dept. 2007).

Upon a review of the record presented, the Court finds that it is undisputed that Bruno escaped from the area where he was supposed to be confined and then attacked and bit the plaintiff. Thus, the key issue is whether the defendants had knowledge of the dog's vicious tendencies beforehand.

The Court concludes that the plaintiff's testimony at his deposition as to what T.J. said to him immediately after the attack, which is to be contrasted with that of the defendants, raises issues of credibility regarding the history of the dog and thus defendants' knowledge of any vicious tendencies. Those central discrepancies should not be resolved on this motion. *Guadalupe v New York City Trans. Auth., supra.* Further, as plaintiff David Rockitter's testimony and that of defendant T.J. Buckowitz were submitted with the moving papers, defendants have failed to make out their *prima facie*

case that they are entitled to judgment as a matter of law, requiring denial of the motion without regard to the strength of the opposing submission. *Winegrad v New York Univ. Med. Ctr., supra.*

All contentions not discussed either are unnecessary to the result reached here or are without merit. All requests for relief not addressed are denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: March 17, 2017

HON. DANIEL PALMIERI
Supreme Court Justice

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ENTERED
MAR 22 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE