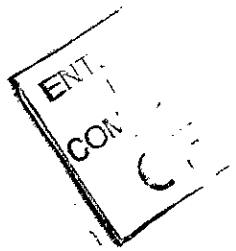
Devine-Holden v Kinneary
2020 NY Slip Op 35181(U)
January 17, 2020
Supreme Court, Nassau County
Docket Number: Index No. 613819/17
Judge: Denise L. Sher



SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

PATRICIA DEVINE-HOLDEN,

Plaintiff,

- against -

DENNIS J. KINNEARY and JOANN A. KINNEARY,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 613819/17
Motion Seq. No.: 01
Motion Date: 10/11/19
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	**1**
Affirmation in Opposition	**2**
Reply Affirmation	**3**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion.

The instant action is one for personal injuries arising out of a dog bite to plaintiff's left hand, that occurred on December 29, 2014, at approximately 5:00 p.m., in the front yard of 9 Roger Drive, Port Washington, County of Nassau, State of New York. *See* Defendants' Affirmation in Support Exhibit C. Plaintiff commenced the action with the filing and service of a Summons and Verified Complaint on or about December 19, 2017. *See* Defendants' Affirmation in Support Exhibit A. Issue was joined on or about January 31, 2018. *See* Defendants'

Affirmation in Support Exhibit B.

In support of the motion, counsel for defendants submits the transcript from plaintiff's Examination Before Trial ("EBT") testimony. *See* Defendants' Affirmation in Support Exhibit D. Counsel asserts that plaintiff testified, in pertinent part, that, "on December 29th, 2014, she was dropping off some packages ... at a friend's house ... at 9 Roger Drive, Port Washington, NY, when she saw a woman walking a dog ... on the sidewalk.... She stopped to pet the dog.... The dog was standing still and not moving ... when she pet the dog behind the ears for less than 30 seconds and the dog bit her.... The dog was not doing anything while she was petting it. It bit her hand and remained still...." *See id.*

Also in support of the motion, counsel for defendants submits the transcript from defendant Dennis J. Kinneary's EBT testimony. *See* Defendants' Affirmation in Support Exhibit E. Counsel asserts that defendant Dennis J. Kinneary testified, in pertinent part, that, "on the date of loss he was the owner of a mutt dog named 'Tuck'.... He had gotten him from a pound in 2011.... Tuck had no formal training. When Tuck was at home he had free rein of the house ... and he was not confined when guests came.... Tuck was good with strangers and liked people.... Mr. Kinneary was unaware of any incident before or after the one complained of where Tuck had bitten anyone.... Mr. Kinneary was not a witness to the event." *See id.*

Also in support of the motion, counsel for defendants submits the transcript from defendant Joann A. Kinneary's EBT testimony. *See* Defendants' Affirmation in Support Exhibit E. Counsel asserts that defendant Joann A. Kinneary testified, in pertinent part, that, "on the day of the accident she was walking her dog, Tuck, on a leash ..., when she saw the plaintiff leave her car to put a package on a porch.... The plaintiff came back to the sidewalk and walked over to

Ms. Kinneary to pet Tuck. She pet (*sic*) Tuck behind his ears and Tuck turned and made contact with one of the plaintiff's hands.... She described it as 'a pinch'.... While Tuck was at home, he had free rein of the house ... and was permitted amongst guests.... Prior to this incident Tuck had not been involved in any other incidents of biting, jumping on people, attacking or '...anything else...'." *See id.*

Counsel for defendants argues, in pertinent part, that, "[f]irst, to the extent that plaintiff's complaint (paragraphs 10 and 11) and Bill of Particulars (paragraph 3) allege that his (*sic*) injuries were caused as a result of the negligence, carelessness, and/or recklessness of the defendants, it is well-settled law that New York Courts do not recognize a negligence cause of action for injuries caused by dogs.... In order to support of claim of strict liability for injuries arising out of an animal attack, the plaintiff must prove that defendants had prior notice of the vicious propensities of the animal, and that those vicious propensities proximately caused the injury. Here, the Kinnearys had no prior notice of any vicious propensities of Tuck the dog and neither did the plaintiff.... Therefore, the plaintiff's action and all cross-claims should be dismissed. [citations omitted]. The Kinnearys (*sic*) testimony at their EBTs, demonstrate (*sic*) their lack of knowledge regarding anything that could be considered a prior vicious act or propensity by Tuck. Up to and including the date of loss, (*sic*) Kinnearys never became aware of any incidents where Tuck ever bit any person or animal, or acted aggressively, viciously, or ferociously, or attacked, harmed, chased, charged, lunged at, or threatened or attempted to harm any person or animal. In the absence of such prior notice, plaintiff's action should be dismissed. [citation omitted]. On the defendants' motion for summary judgment in an alleged dog bite case, the defendants have the initial burden of establishing that they did not know of any vicious

propensities on the part of the dog. [citation omitted]. Defendants have met that burden here." *See* Defendants' Affirmation in Support Exhibit C.

In opposition to the motion, counsel for plaintiff submits that plaintiff testified at her EBT, in pertinent part, that "Ms. Devine-Holden first observed the dog when it was approximately 4 feet to the left of her on the sidewalk.... Prior to the incident taking place Ms. Devine-Holden asked the dog's owner 'May I pet your dog?'... After asking the dog's owner if she could pet the dog, the owner said 'well sometimes he jumps.'... Ms. Devine-Holden then held out her left hand under the dog's jaw.... Ms. Devine-Holden began petting the dog behind its ears, for approximately 30 seconds.... After petting the dog for 30 seconds the dog bit Ms. Devine-Holden's hand.... Ms. Devine-Holden's palm began bleeding, as she had sustained puncture wounds from the dog's teeth.... Ms. Devine-Holden saw the dog again, subsequent to the accident, when she visited the Defendants' home in order to obtain information to confirm that the dog was up to date on its shots.... When ringing the Defendant's (*sic*) doorbell Ms. Devine-Holden heard the dog barking excessively.... Ms. Devine-Holden testified, 'He barked a lot and came right up to the sidelight and was barking'...." *See* Defendants' Affirmation in Support Exhibit D.

Counsel for plaintiff argues, in pertinent part, that, "[t]he record establishes questions of fact as to the vicious propensity of Tuck, warranting denial of the Defendants' motion in its entirety. Specifically, subject (*sic*) the dog admittedly barked excessively, was aggressive to other dogs and was a result of 'overbreeding'.... [T]he evidence establishes that Tuck had vicious propensities prior to the incident and the Defendants knew or should have known about it. Specifically, the court is reminded that the Plaintiff testified that after asking the dog's owner if she could pet the dog, the owner said 'well sometimes he jumps'.... When ringing the

Defendant's (*sic*) doorbell, Ms. Devine-Holden heard the dog barking excessively.... Considering the evidence establishes that there are questions of fact us (*sic*) to Tuck's prior vicious propensities, based not only upon the Defendant's (*sic*) unfamiliarity with his origins, but also by considering that Tuck admittedly did not get along with other dogs and would excessively bark and jump on people. As such, Defendants' motion should be denied."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film*

Corp., *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Issue finding, rather than issue determination, is the key to summary judgment. *See In re Cuttitto Family Trust*, 10 A.D.3d 656, 781 N.Y.S.2d 696 (2d Dept. 2004); *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002); *Gniewek v. Consolidated Edison Co.*, 271 A.D.2d 643, 707 N.Y.S.2d 871 (2d Dept. 2000); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2d Dept. 2000). The court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974); *Surdo v. Albany Collision Supply, Inc.*, 8 A.D.3d 655, 779 N.Y.S.2d 544 (2d Dept. 2004); *Greco v. Posillico*, *supra*; *Petri v. Half Off Cards, Inc.*, 284 A.D.2d 444, 727 N.Y.S.2d 455 (2d Dept. 2001)), and the papers should be scrutinized carefully in the light most favorable to the party opposing the motion. *See Glover v. City of New York*, 298 A.D.2d 428, 748 N.Y.S.2d 393 (2d Dept. 2002); *Perez v. Exel Logistics, Inc.*, 278 A.D.2d 213, 717 N.Y.S.2d 278 (2d Dept. 2000).

Summary judgment is a drastic remedy which should not be granted when there is any doubt about the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. It is nevertheless an appropriate tool to weed out meritless claims. *See Lewis v. Desmond*, 187 A.D.2d 797, 589 N.Y.S.2d 678 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N.A.*, 82 A.D.2d 168, 442 N.Y.S.2d 610 (3d Dept. 1981).

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 known of the animal's vicious propensities. *See Petrone v. Fernandez*, 12 N.Y.3d 546, 883 N.Y.S.2d 164 (2009). As such, plaintiff's attempt to impose liability sounding in principles of negligence must fail.

When a plaintiff seeks to recover in strict liability in tort for a dog bite, said plaintiff must prove that the dog has vicious propensities and that the owner or the person in control of the premises where the dog was kept knew, or should have known, of such propensities. *See Lugo v. Angle of Green, Inc.*, 268 A.D.2d 567, 702 N.Y.S.2d 608 (2d Dept. 2000); *Ayres v. Martinez*, 74 A.D.3d 1002, 902 N.Y.S.2d 668 (2d Dept. 2010); *Collier v. Zambito*, 1 N.Y.3d 444, 775 N.Y.S.2d 205 (2004); *Christian v. Petco Animal Supplies Stores, Inc.*, 54 A.D.3d 707, 863 N.Y.S.2d 756 (2d Dept. 2008).

"Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap or bare its teeth, the manner in which the dog was restrained, [the fact that the dog was kept as a guard dog], and a proclivity to act in a way that puts others at risk of harm." *Ayres v. Martinez, supra quoting Hodgson-Romain v. Hunter*, 72 A.D.3d 741, 899 N.Y.S.2d 300 (2d Dept. 2010). Knowledge of a dog's vicious propensities may also be established by evidence as to whether the owner chose to restrain the dog and the manner in

which the dog was restrained. *See Collier v. Zambito*, *supra*.

In the instant matter, the Court finds that defendants have made a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence that they lacked knowledge of their dog Tuck's alleged vicious propensities. Defendants demonstrated that Tuck had never previously bitten anyone nor exhibited any other signs of viciousness. In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff failed to come forward with any proof, in evidentiary form, that defendants' dog had ever previously bitten anyone or exhibited vicious propensities. Counsel for plaintiff's interpretation of the testimony of the parties, to fit his theories of the case, are not shared by the Court. Nowhere in defendants' testimony did they assert that their dog, Tuck, did not get along with other dogs, or that Tuck would excessively bark and jump on people. Nor is there any evidence that defendants' dog Tuck was over-bred as counsel for plaintiff alleges.

Therefore, based upon the above, defendants' motion, pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Verified Complaint, is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
XXX

Dated: Mineola, New York
January 17, 2020

ENTERED
JAN 22 2020
NASSAU COUNTY
COUNTY CLERK'S OFFICE