

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 32

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BARBARA HERBIN,

Plaintiff,

-- against --

DECISION and ORDER

Index No. 15712/2007

LINDA HENRICH and THOMAS R. HENRICH
and JESSE HOCKER.

Defendants.

MSN: 18

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The following papers numbered were read on this motion: Papers Numbered

Notices of Motion, Affirm., Exhibits.....1
Affirmations in Opposition.....2

CHARLES J. MARKEY, J.:

Plaintiff Barbara Herbin seeks to vacate a prior decision of this Court, dated April 14, 2009, which upon plaintiff's default, granted summary judgment to the defendants, out-of-possession landlords, in an action based on an alleged dog bite. The present case is not the first action against an out-of-possession landlord, but the circumstance that makes this case especially interesting is that the dog in question was a gift from the defendants' relative to the tenant. This controversy arises when a guest of the tenant was bitten by the dog.

Defendant Jesse Hocker ["Hocker"], who has not served an answer to the complaint and has defaulted, was a tenant of his co-defendants Linda and Thomas Henrich ["the Henrich defendants"], at a house then owned by them at 22-39 120th Street in College Point, Queens County, New York. The Henrich defendants did not live at the house they rented, but at another house in College Point. Hocker owned an Akita dog named Sheena. Herbin visited Hocker on February 27, 2007. Hocker left the house for a few minutes leaving Herbin alone with his dog Sheena.

While Herbin was seated, she reached across the coffee table, intending to get a cigarette, when Sheena allegedly bit her about her face, requiring stitches for puncture wounds, at Booth Memorial Hospital in Flushing, Queens. This lawsuit followed, seeking damages for the injuries sustained by the dog bite.

All the defendants were served with the summons and complaint on July 9, 2007. By order dated November 1, 2007, and entered by the County Clerk on December 6, 2007, Hocker was held in default for his failure to answer the summons and complaint.

The Henrich defendants, the out-of-possession landlords, moved for summary judgment.

Plaintiff's counsel, after seeking a few adjournments of the motion, then defaulted, and this Court, by order dated April 14, 2009, then dismissed the complaint. Herbin now seeks to vacate the prior order and to argue the summary judgment motion.

First, the Court thanks both counsel for their able presentations. The Court appreciated the fact that plaintiff, in moving for a default, continued to brief and address the underlying summary judgment motion. Too often, lawyers seeking to vacate a default devote their entire discussion to the default and then do not address the underlying issue in the event that the Court finds a reasonable excuse for the default and a meritorious cause of action or defense. A failure to discuss the ultimate issue in dispute thus forces judges and judicial personnel into extra labors.

Plaintiff's counsel explains that it could not oppose the defense motion for summary judgment because it was still waiting for responses from municipal agencies to determine whether there were reported incidents involving the dog who is the subject of this particular action. Such evidence would be relevant to the ultimate issue of whether the dog exhibited prior vicious tendencies that would bear on whether or not the defendants likely knew of any past aggressive behaviors of biting, growling, or snarling.

Plaintiff apparently signed authorizations for release of health information pursuant to HIPAA on November 29, 2007, but her counsel did not serve the New York City Department of health with any request until February 25, 2009. Plaintiff's counsel should have served the municipal agencies immediately with the authorizations and requests on either July 9, 2007, the date of the service of the summons and complaint upon the defendants, since the heart of any action regarding a dog bite seeking damages from an out-of-possession landlord is whether the landlord had knowledge of the canine's alleged vicious propensities. Plaintiff's counsel could also have served the HIPAA-compliant authorizations on November 29, 2007, the date they were actually signed by plaintiff, subsequent to this Court's decision finding a default against Hocker. Plaintiffs, in personal injury actions, are commonly asked by their counsel to sign authorizations in blank the minute they sign a retainer agreement.

Instead, plaintiff's counsel waited to serve the HIPAA-compliant authorizations upon the municipal agencies to learn of any prior incidents involving Sheena until after the making of the motion for summary judgment by the Henrich defendants, the out-of-possession landlords. The defense motion was filed on December 24, 2008, and appeared on the undersigned's motion calendar on January 15, 2009. It was adjourned to March 3, 2009, to allow plaintiff time to oppose the motion, and then it was adjourned again to April 2, when plaintiff failed to appear, thus leading to the decision and order that granted the motion for summary judgment on default. Fortunately, the City responded to the request fairly quickly, on or about April 1, 2009, despite plaintiff counsel's huge delay in obtaining records that would have been essential to support an award of damages against the defendants, especially an out-of-possession landlord.

Defendants vigorously oppose vacating the Court's prior decision. They argue that an alert plaintiff would have demanded the necessary records immediately upon commencement of

the action, without waiting for the last minute, dramatic, and post-motion rush indulged by them.

Although the Court agrees with defense counsel entirely on a theoretical and conceptual basis, the undersigned, as a practical matter, would not like to punish the plaintiff herself for the delay. First, the law favors resolution on the merits. Especially where plaintiff and her counsel have not shown any intentional action to abandon an action and there is no prejudice to defendants, the failure to vacate a default may amount to reversible error. *See, e.g., Dorio v. County of Suffolk*, 58 AD3d 594 [2nd Dept. 2009]; *Moore v. Day*, 55 AD3d 803 [2nd Dept. 2008]. Second, and pertaining to the facts in the present case, in *Matter of Murray v. Matusiak*, 247 AD2d 303 [1st Dept. 1998], the Appellate Division reversed the lower court's refusal to vacate a default, even though the petitioner had been "dilatatory" in seeking information under the Freedom of Information Law ["FOIL"]. Following those precedents, the Court will grant the branch of the motion to vacate the default of plaintiff that led to the dismissal of the complaint in this Court's decision of April 14, 2009.

Turning to the merits of the defendants' earlier motion for summary judgment, the Court has read thoroughly all of the papers submitted by the plaintiff on the present motion to vacate, including the transcripts of the examinations before trial ["EBT"] appended thereto, searching for some or any issue of fact capable of withstanding summary judgment. The Court could not find any issue of fact.

First, the 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. *See, Petrone v. Fernandez*, 12 NY3d 546 [2009] [4-2 decision]; *Collier v. Zambito*, 1 NY3d 444, 448 [2004] [4-2 decision] ["This disposition does not entitle dog owners to an automatic 'one free bite.' There could certainly be circumstances where, although a dog has not yet bitten a person, its vicious nature is apparent."]; *Dykeman v. Heht*, 52 AD2d 767 [2nd Dept. 2008].

In *Madaia v. Petro*, 291 AD2d 482 [2002], the Appellate Division, Second Department held that an out-of-possession landlord could not be held liable for a dog bite because the landlord did not know that there was a pet harbored on the property. In the present case, however, the Henrich defendants knew of the pet's existence; defendant Linda Henrich's sister, indeed, had given the Akita dog, as a puppy, to Hocker. *Madaia* also adds, reflective of the current law unchanged even after the Court of Appeals's recent decision in *Petrone, supra*, 12 NY3d 546, that to obtain liability the out-of-possession landlord "knew or should have known that the dog had vicious propensities." *Id.* at 483.

Dominic Zafonte, Esq., in representing the Henrich defendants, skillfully demonstrated in questioning plaintiff Herbin at her EBT of June 18, 2008, that there was no indication at all that Sheena had any vicious propensity of any kind prior to the alleged attack of February 27, 2007. Herbin, at **no** time when visiting her friend Hocker, found a muzzle for Sheena or a posted

“Beware of Dog” sign. The most that plaintiff’s counsel could yield at the EBTs of both defendants, also held on June 18, 2008, was the hearsay testimony that, on some subsequent date after the dog bite that Herbin sustained, Sheena may have bitten another dog. That fact does not show a prior knowledge of a dog’s alleged vicious propensity.

The failure at the EBTs of the plaintiff to yield any knowledge by the Henrich defendants of Sheena’s vicious propensities was compounded by the results of the tardy FOIL requests submitted by plaintiff. The municipal records showed no prior incident involving Sheena.

Even in the motion papers, on the present motion to vacate the default, Herbin’s counsel is reduced to making contradictory statements that “Hocker always made the dog lay down by the door area” or “the dog was permitted to walk freely in the house.” Neither of the two statements, at any rate, shows knowledge by the Henrich defendants - - or by anyone else - - of any vicious propensity by Sheena prior to the alleged attack that formed the basis of this action. *Compare Duncan v. Miller*, 2008 WL 2973948 [Pa. Ct. Common Pleas 2008] [summary judgment motion by out-of- possession landlord-defendants, in dog bite case, was denied] *with Ranwez v. Roberts*, 268 Ga. App. 80, 601 S.E.2d 449 [2004] [summary judgment granted to out-of- possession landlord-defendant in dog bite case].

In order for a plaintiff, in a dog bite case, to tether a defendant in liability, especially an out-of-possession landlord, it must show some indication that the defendant knew or should have known of the dog’s alleged vicious propensity. In the present case, plaintiff failed even remotely to make such a demonstration. The meager results here that the dog was a gift by the Henrich defendants’ sister to Hocker and the hearsay reference that it bit another dog after the bite sustained by Herbin shows that plaintiff’s counsel has been barking up the wrong tree.

The branch of the motion seeking to vacate the prior default is granted. The prior order of April 14, 2009 is vacated. Upon accepting and reading the plaintiff’s motion, the Court adheres to its prior determination, in the April 14, 2009 order, that summary judgment ought to be granted to the Henrich defendants. The complaint is dismissed as against only the Henrich defendants.

The foregoing constitutes the decision, order, and opinion of the Court.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York
July 17, 2009

Appearances:

For the plaintiff: Mallilo & Grossman, Esq., by Francesco Pomara, Jr., Esq., 163-09 Northern Blvd., Flushing, N.Y. 11358

For the defendants Linda Henrich and Thomas R. Henrich: Law Office of Andrea G. Sawyers, Esq., by Dominic Zafonte, Esq., 3 Huntington Quadrangle [suite 102S], P.O. Box 9028, Melville, N.Y. 11747