

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 13
Justice

	x	Index	
STEVEN RYDER		Number <u>11509</u>	2000
		Motion	
- against -		Date <u>March 10,</u>	2004
		Motion	
WALTER LOPEZ		Cal. Number <u>40</u>	
	x		

The following papers numbered 1 to 9 read on the motion by defendant for summary judgment dismissing plaintiff's complaint against him.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Affirmation in Opposition - Exhibits	5-7
Reply Affidavits - Exhibits	8-9

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff seeks to recover for injuries he suffered on May 31, 1997 when he was bitten by the defendant's dog. Plaintiff alleges that, on the date in question, he and a realtor were visiting the defendant's home, which was being shown for sale. Plaintiff alleges that two dogs, one of which weighed about 75 pounds, were loose in the fenced-in yard. Plaintiff acknowledges that the owner of the premises did indicate to him that there were dogs in the backyard. Plaintiff alleges that he approached the backyard, placed his hands on the fence, and leaned over the fence into the yard for purposes of ascertaining the property line. Plaintiff states that as he was moving his upper body back over the fence, the large dog jumped up and bit his right index finger. Plaintiff submits a physician's affirmation that, to date, he has decreased sensation in his right index fingertip.

In cases of this nature, a plaintiff bears the difficult burden of coming forward with evidence establishing "either the existence of the dog's alleged vicious propensities or the [defendant's] knowledge thereof." (Sers v Manasia, 280 AD2d 539; Tessiero v Conrad, 186 AD2d 330.) Moreover, in recent cases it has been clearly established that neither the characteristics of a breed, the severity of the attack, the fact that the dog might often be confined in a pen, nor the existence of a "beware of dog" sign on the premises can, without more, suffice to raise an issue of fact as to vicious propensities. (Sers v Manasia, supra; Lugo v Angle of Green, 268 AD2d 567.)

While summary judgment was recently denied in a case where a realtor was injured by a dog allowed loose on premises that were being shown for sale, those facts are distinguishable where, in that case, there were written representations that the dog would be kept in the garage on occasions when the property was to be shown. (Goldberg v LoRusso, 288 AD2d 257.) Here, there were no such representations and, moreover, the plaintiff was specifically told of the presence of dogs in the yard. Finally, in a recent Appellate Division, Third Department case, it was determined that a notation in a veterinary record will not satisfy the element of propensity where is not shown that such indications as to temperament were communicated to the owners. (Blackstone v Hayward, 304 AD2d 941.)

Where a party is unable to demonstrate strict liability based upon defendant's awareness of vicious propensities, a plaintiff may be able to establish liability based upon negligence by showing defendant's violation of leash laws or other regulations, or by establishing a heightened duty of care upon the owner of the premises. (See, Colarusso v Dunne, 286 AD2d 37 [dog maintained by child day care center owner]; 14 NY Pac, Strict Liability § 5:4.) No such demonstrations are made here. Accordingly, plaintiff has failed to meet his burden of raising a triable issue of fact, and defendant's motion for summary judgment in his favor is granted.

Dated: May 11, 2004

J.S.C.