SHORT FORM ORDER

INDEX No. 05-10473
CAL. No. 06-02578-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 12-11-06
ADJ. DATE 2-22-07
Mot. Seq. # 001 - MD

MICHAEL MARELLI,

Plaintiff,

- against -

GERARD BRANDLY and ELLEN BRANDLY,

Defendants.

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Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 19 - 25; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants, Gerard Brandly and Ellen Brandly, for an order granting them summary judgment dismissing the plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff, Michael Marelli, on September 22, 2004 as a result of being bitten by defendant Gerard Brandly's dog, which was harbored at Mr. Brandly's home, located at 121 Tenth Street, Holtsville, County of Suffolk, New York. Plaintiff, an employee of Suburban Exterminating Services, Inc., arrived at Mr. Brandly's home to perform extermination services and was bitten in his chin by the dog after Mrs. Brandly allowed the dog to enter the home unrestrained. At the time of the incident, Ellen Brandly was pregnant and engaged to Gerard Brandly. Ellen Brandly did not live at the premises, and Gerard Brandly was the sole owner of both the dog and the home.

Defendants now move for summary judgment on the basis that they did not have prior notice of any vicious propensities on behalf of their dog because he had never bitten anyone before the plaintiff. Defendants also assert that Ellen Brandly was not negligent in allowing the dog to enter the premises unrestrained. Defendants submit the pleadings, copies of deposition transcripts of plaintiff and defendants and Gerard Brandly's affidavit.

Plaintiff opposes defendants' motion on the grounds that there are significant factual differences in the occurrence of the accident itself and that evidence has been presented that the dog exhibited vicious and aggressive tendencies. Plaintiff submits copies of the deposition transcripts of plaintiff and defendants and photographs of plaintiff's injury.

Plaintiff at his examination before trial testified that on September 22, 2004, he was employed by Suburban Extermination Services. He stated he was at the Brandly home to perform an inspection and provide treatment for the ant problem in the home. Plaintiff testified that when he arrived he was greeted at the door by a woman, whom he referred to as Mrs. Brandly and was unaware of a dog's presence in the home. He stated that while speaking with Mrs. Brandly in the kitchen he noticed a dog jumping and making noises at the sliding glass door. He stated that Mrs. Brandly decided to let the dog in because it was being distracting. Mr. Marelli testified that prior to Mrs. Brandly opening the back door, he asked her if "he bites" and she responded "no, no. He has never bitten anyone before. He is uncomfortable around people in uniform, but it's okay." Mr. Marelli testified that he was in his Suburban uniform and standing behind the kitchen table. He stated that after she opened the door, the dog ran straight towards him, growled and jumped up and bit him in his face. He testified that he did not bend down or greet or pet the dog prior to it biting him on his chin. Plaintiff stated the dog bit him once on his chin and then tried to bite him a second time but he pushed the dog away. Plaintiff stated he ran into the closest room, which turned out to be the bathroom, to get away from the dog, but the dog remained at the bathroom door barking. Mr. Marelli testified that Mrs. Brandly apologized to him for the incident and offered him a liquid Band-Aid and peroxide. Mr. Marelli further testified that he went to the hospital where he received six stitches in his chin.

Ellen Brandly testified at her examination before trial that at the time of the incident she was pregnant and engaged to Mr. Brandly, whom she had dated since approximately 2002. She testified that she did not live with Mr. Brandly in September of 2004 but that her and her two children lived with her parents. She stated that she would stay at Mr. Brandly's house if he needed her help to let the dog in or out or let contractors in because he was in the process of renovating his house. Mrs. Brandly testified that she was at Mr. Brandly's house on September 22, 2004 because Mr. Brandly was away on a golfing trip and the exterminator was coming about the ants in the kitchen. She stated Mr. Brandly owned a female Boxer named Bo, whom he had since she was a puppy. Mrs. Brandly stated that her and her children had been around Bo "quite a few times" prior to plaintiff's accident and the dog was always fine with them. She stated she placed the dog in the backyard prior to the exterminator's arrival at about 9:00 or 9:30 am because Suburban had informed her that they would exterminate inside of the home, but Mr. Marelli stated that he would start exterminating outside. Mrs. Brandly testified that she informed Mr. Marelli to leave the house before she brought the dog inside since the dog belonged to Mr. Brandly and she was not sure how the dog would behave around other people. She testified that Mr. Marelli, who had been looking at the dog through the backdoor, told her that she could let the dog in and that the dog was "so cute." She stated that when she let the dog in, she was "kinda" holding Bo by the leash and Mr. Marelli was talking to the dog, who was wagging her tail and did not growl or do anything else. Mrs. Brandly testified that Mr. Marelli then patted his chest for Bo to jump up on him, but as Bo was jumping up, Mr. Marelli bent down and then she saw Mr. Marelli holding his chin and running into the bathroom. Mrs. Brandly stated that when the incident occurred she was standing in the dining room behind the dining room table and saw Bo jump, but did not see the contact between Bo and Mr. Marelli but assumed that Mr. Marelli had "clunked" heads with Bo. She stated that after the incident she took Bo upstairs and put her in one of the bedrooms and shut the door. Mrs. Brandly testified that Mr. Marelli apologized to her and stated "oh, I guess her tooth or something caught my chin when I bent down." Mrs. Brandly further testified that at the time of the incident, Mr. Marelli had not exterminated the house but after the incident he performed the extermination services.

Gerard Brandly testified at his examination before trial that on the day of the incident he was away on a golfing trip and Mrs. Brandly, who was his fiancée, was there to let the exterminator in. Mr. Brandly testified that he was the sole owner of the premises and the subject dog, a Boxer named Bo. He stated that he has owned Bo since she was a puppy and she was eight years old at the time of the incident. He testified that Bo is small for her breed of dog, weighed approximately 45 pounds and is brownish white in color. Mr. Brandly stated that Bo had received training at a kennel in Massachusetts. Mr. Brandly testified that his dog was protective around his mother and he is unsure of whether or not Bo was protective of Mrs. Brandly at the time of the incident, although she is presently protective of her. He testified that his fiancée did not inform him about the incident until after he received a letter from the plaintiff's attorneys. He stated that she informed him that the accident occurred as a result of the plaintiff and Bo "knocking heads" when the plaintiff bent down as Bo was jumping up on the plaintiff.

Mr. Brandly, by his personal affidavit, stated that at the time of the incident his fiancée, Ellen Brandly, did not reside with him. He explained that Bo had never bitten anyone prior to the accident with Mr. Marelli. He stated that Bo has never displayed any aggressive tendencies and is a playful dog that gets along well with both adults and children. Mr. Brandly also asserted that Bo has had very little contact with men in uniforms. Mr. Brandly states that when he thinks of men in uniforms he thinks of "police officers, firemen, soldiers and perhaps a postman." Mr. Brandly further indicated that prior to the accident, Mrs. Brandly had not spent a lot of time around Bo in order for her to be able to state to the plaintiff that "Bo was uncomfortable around men in uniform."

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 issue of fact (*see,* ***Alvarez v Prospect Hospital***, 68 NY2d 320 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

An owner of a domestic animal will be held liable for injuries caused by that animal where it is demonstrated that the animal had vicious propensities, which includes the propensity to do "any act that might endanger the safety of the persons or property of others in a given situation" (***Collier v Zambito***, 1 NY3d 444, 775 NYS2d 205 [2004]; *quoting* ***Dickson v McCoy***, 39 NY 400 [1868]), and the owner knew of the animal's vicious propensities (***Bard v Jahnke***, 6 NY3d 592, 815 NYS2d 16 [2006]; ***Collier v Zambito***, *supra*; ***Tessiero v Conrad***, 186 AD2d 330 [1992]; *see also,* ***Mindel v Jones***, 16 AD2d 857, 791 NYS2d 692 [2005]; ***Beljean v Maiuzzo***, 256 AD2d 533, 683 NYS2d 104 [1998]; *see also,* Restatement [Second] of Torts §§ 509, 518). Proof of a vicious propensity may be demonstrated by showing defendant's awareness of a prior vicious act or that the animal had the proclivity to act in such a vicious manner (***Mindel v Jones***, *supra*; ***Lagoda v Dorr***, 28 AD2d 208, 284 NYS2d 130 [1967]). However, vicious propensity is not established solely by the violent tendencies of a breed, the fact that the animal is confined or the severity of the attack on the plaintiff (***Sers v Manasia***, 280 AD2d 539, 720 NYS2d 192 [2001]; *see also,* ***Lugo v Angle of Green, Inc.***, 268 AD2d 567, 702 NYS2d 608 [2000]; ***Althoff v Lefebvre***, 240 AD2d 604, 658 NYS2d 695 [1997]; ***De Vaul v Carvigo, Inc.***, 138 AD2d 669, 526 NYS2d 483 [1988]).

Based upon the foregoing, the defendants have failed to meet their burden of establishing their entitlement to judgment as a matter of law (***Winegrad v New York Univ. Med. Center***, *supra*; ***Zuckerman v City of New York***, *supra*). There are questions of fact regarding both the happening of the accident itself and the defendants' knowledge of the dog's vicious propensities, which prevents the granting of summary judgment at this time (***Baisi v Gonzalez***, 97 NY2d 694, 739 NYS2d 92 [2002] ***Winegrad v New York Univ. Med. Center***, *supra*; ***Zuckerman v City of New York***, *supra*;). The description of the accident's occurrence and the resultant injury given by the plaintiff and Mrs. Brandly differ significantly and consequently raises issues of credibility that are beyond the scope of the court's function on a motion for summary judgment (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1989]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]). Plaintiff Marelli testified that the accident occurred when the dog named Bo, after being let into the house by Mrs. Brandly, ran towards him, growled, jumped up and bit him in his chin and attempted to bit him a second time, but he was able to prevent that bite by pushing the dog away from him. In contrast, Mrs. Brandly, who admitted to not actually seeing the contact between the plaintiff and the dog, stated the accident occurred, when Mr. Marelli bent down towards the dog after calling Bo towards him and patting his chest signaling for the dog to jump up on him. In addition, Mrs. Brandly described the plaintiff's cut as being minor, with a little dot of blood on his chin, may be a quarter of an inch in size, whereas Mr. Marelli stated the wound was large enough for a Tic Tac to fit into it and blood was dripping down his neck, onto the floor , trailing into the bathroom and all over the bathroom sink. Additionally, there is a question of fact as to whether or not Mrs. Brandly informed the plaintiff that Bo was uncomfortable around people wearing uniforms, which the plaintiff was wearing.

Moreover, there are questions as to whether the defendants were aware of the dog's aggressive tendencies (***Bard v Jahnke***, *supra*; ***Collier v Zambito***, *supra*; ***Mindel v Jones***, *supra*; ***Beljean v Maiuzzo***, *supra*). Mrs Brandly testified that she had placed the dog in the backyard prior to plaintiff's arrival, and before she allowed the dog back into the house, she asked the plaintiff to step outside because she was unsure of the animal's behavior around other people since the dog was Mr. Brandly's and not hers. Mr. Brandly also testified that Bo was very protective of his mother as well as Mrs. Brandly. Notwithstanding the fact that Mr. Brandly testified that Bo had never bitten anyone or exhibited any aggressive tendencies, he also stated that Bo had received training but did not explain whether the training was simply obedience training or if it included guard dog training. In addition, the plaintiff testified that prior to the dog's biting him, the dog had been at the sliding glass door jumping up at the door and barking while watching him. Therefore, it cannot be said that issues of fact do not exist regarding the defendants' knowledge of Bo's vicious propensities (***Morse v Colombo***, 8 AD3d 808, 777 NYS2d 824 [2004]; ***Cronin v Chrosniak***, 145 AD2d 905, 536 NYS2d 287 [1988]; *cf.*, ***Malpezzi v Ryan***, __ AD3d __ , 815 NYS2d 295, 2006 NY Slip Op 3138, 2006 NY App Div LEXIS 4971 [April 2006]; ***Lugo v Angle***, 268 AD2d 567, 702 NYS2d 608 [2000]).

Accordingly, defendants' motion for summary judgment is denied.

Dated: MAY 2 1 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION