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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Shirley Werner Kornreich Justice PART 54

Index Number : 114211/2004
AMELL, FREDRIK
vs
O'LEARY, SUSAN
Sequence Number : 006
SUMMARY JUDGMENT

INDEX NO. 114211/04
MOTION DATE 3/29/07
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

Motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/26/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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FREDRIK AMELL,

Plaintiff,

Index No.: 114211/04

- against-

DECISION and ORDER

SUSAN O'LEARY, ANTONIO MAROTO and ANA'S CAFÉ, LLC,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

This personal injury action arises from a dog bite that occurred outside of Ana's Café, LLC ("Ana's") a restaurant. Defendants, the co-owner's of Ana's, and Ana's, now move for summary judgment dismissing the complaint and plaintiff's demand for punitive damages. In a separate motion, defendant O'Leary moves for summary judgment. Plaintiff opposes. The motions are consolidated for disposition.

I. *Statement of Facts*

A. *Defendants Proof*

In support of their motion, defendants offer the deposition testimony of Susan O'Leary and Antonio Maroto who testified to the following. They have been involved in a romantic relationship since 2002. O'Leary, however, maintains her own residence at 1220 Park Avenue, New York, N.Y., and Maroto rents an apartment in a townhouse, owned by O'Leary, at 224 West 139th Street, New York, N.Y. O'Leary has never lived at 224 West 139th Street. The two of them co-own Ana's Café located at 103rd Street and Broadway, New York, N.Y. During the summer of 2004, plaintiff Fredrik Amell approached Maroto about the possibility of working at Ana's. Maroto told him they might be able to work something out, and that he should come back and work a few days a week to see if it was a good fit. Plaintiff, thus, began "training" as a waiter.

On July 26, 2004, O'Leary was working at Ana's. It was Maroto's day off, but he stopped by Ana's to check and see if everything was OK. He brought his dog "Max", [a 120 pound brown and white Akita], with him, but did not bring Max inside the café. Rather, Maroto tied Max's leash to either a parking meter or a fire hydrant on the curb of the sidewalk, just outside of Ana's. O'Leary went outside and pet Max for approximately 10 minutes before she left for dinner. Plaintiff testified to the following. He was also working at Ana's and planned on remaining there that evening until he "finished up." After O'Leary left, plaintiff went outside to take a break, see Maroto, and play with Max. He walked over to the dog and began petting it. He put his hand out so Max could smell it, and the dog began licking him. When he got down on one knee and rubbed Max's head, the dog growled for a split second, and jumped at plaintiff biting him in the face and on his arm. As a result of the attack, plaintiff lost his upper lip, suffered severe facial wounds and puncture wounds to his arm.

O'Leary testified that she never owned or exercised any dominion or control over Max. She claimed that Maroto adopted Max from the Center for Animal Care and Control on September 20, 2002. O'Leary admitted that she accompanied Maroto to the Animal Shelter "on his quest for a pet" the day before but testified she was not there when he officially adopted Max the next day. Maroto is listed as the sole owner on the dog license issued by the City of New York's Department of Health and Mental Hygiene. The records kept by the Center for Animal Care and Control also list Maroto as the only owner. Maroto testified that Max lived with him and that O'Leary did not own the dog.

Prior to the attack, O'Leary testified that she only took Max to the vet on certain occasions, that she walked Max, and that she would take him running. She further testified that Maroto decided to euthanize the dog, after the attack, and at his request, she called the vet, made the appointment, took Max to be euthanized, and paid for it. Max was euthanized on August 16, 2004.

Maroto and O'Leary both testified that Max did not have any vicious propensities. On his visits to the vet, O'Leary stated Max was well behaved. She claimed he only growled and never attempted to bite or lash out at anyone and classified Max's temperament as "playful." Maroto testified that, prior to this attack, Max never jumped on anyone or bit Maroto. He also testified that there are no scars on his arms from any dog bites, that Max was never muzzled or disciplined and that he never received any complaints regarding the dog's temperament.

B. *Opposition*

Plaintiff testified that while he was inside Ana's behind the bar, Maroto brought Max inside the café for approximately 4-5 minutes. O'Leary told Maroto that it was not a good idea for Max to be inside, and as a result, Maroto took Max outside. O'Leary, then, went outside and pet the dog for approximately 10 minutes.

Maroto testified that O'Leary took Max to the vet most of the time because "she was more familiar with the animal system...had previous dogs...so she took more control of Max." Plaintiff presents medical records from Max's visit to the Westside Veterinary Center ("Westside") on November 20, 2002, Cathedral Dog and Cat Hospital ("Cathedral") on October 30, 2003, as well as when he was euthanized on August 16, 2004. The invoice from Westside lists O'Leary's daughter Liz as the client, and O'Leary's Park Avenue residence as Max's address. Further, Maroto testified that Westside and Cathedral were the only hospitals Max ever visited.

O'Leary testified that she is listed as the client, and her home phone number and Park Avenue address is listed on the October 30, 2003 visit file; the business phone number listed is her cell phone. She also paid for the treatment. Dr. Henry Fierman, the owner of Cathedral for 27 years, testified that it is custom and practice at Cathedral when an animal is received for treatment to ask that person if they own the animal. He stated that this is done because, often, more than one person brings the animal in for treatment and Cathedral needs to keep track of

who the owner is. Only O'Leary is listed on Cathedral's records as Max's owner and Dr. Fierman testified that O'Leary identified herself as the owner of the dog.

Regarding the euthanization, Cathedral records list O'Leary as the client, and that she paid for both the euthanization and cremation on August 16, 2004. Dr. Fierman testified that Cathedral is only allowed to euthanize a dog at the request of its owner. O'Leary averred that the signature on the euthanization authorization is not hers, despite her testimony that she called, made the appointment, took the dog there, and paid for the procedure. Maroto testified that it was O'Leary who decided to have the dog cremated.

Moreover, Dr. Fierman testified that during his examination of Max on October 30, 2003, the dog was difficult to deal with, was aggressive, and had to be muzzled. He further testified that prior to giving Max a flea bath, due to safety concerns, Max had to be muzzled and tranquilized because he tried to attack and bite Dr. Fierman and his technician. Additionally, plaintiff testified Maroto called him on July 27, 2004, while he was at the hospital, to apologize, and that, during this conversation, Maroto told him Max was a "weapon of mass destruction" and that he would not let his daughter in the same room as the dog. Plaintiff also testified that in this conversation Maroto told him Max had bitten him before and, as a result, he received stitches in his arm. Maroto denied that this conversation ever took place.

Finally, plaintiff offers the expert testimony of Dr. Jeffrey Burkes, D.D.S. He was asked to examine Maroto for any possible dog bites. Dr. Burkes examined Maroto on October 6, 2006 and, per his methodology, examined plaintiff on October 9, 2006. He also reviewed six photographs of plaintiff's arm taken after the accident, and took eleven photos of Maroto's arm during his examination. Dr. Burkes concluded, with reasonable medical certainty, that the scar on Maroto's arm was caused by a dog bite. In addition, he concluded that this scar was similar to the one on plaintiff's arm caused by Max's attack.

II. *Conclusions of Law*

A party moving for summary judgment must make a prima facie showing of entitlement to judgement as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). Once movant has made the requisite showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of material fact. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003).

A. *Ana's Liability*

In order for a premises owner to be held liable for a dog bite, plaintiff must demonstrate defendant knew of the dog's presence on the premises, its vicious propensities, and also that defendant had control of the premises or otherwise had the capability to remove or confine the dog. *Phillips v. Coffee To Go Inc.*, 269 A.D.2d 123, 124 (1st Dept. 2000); *Pringle v. New York City Hous. Authority*, 260 A.D.2d 623 (2nd Dept. 1999). Ordinarily, property owners owe no duty to persons outside their premises, and summary judgment has been granted in favor of premises owners, dismissing complaints of dog-bite victims, where the injuries occurred outside of the premises. *See Phillips*, 269 A.D.2d at 123 (summary judgment granted to restaurant where plaintiff bitten by owners dog on sidewalk where dog was tethered to a pole and plaintiff's own EBT made it clear plaintiff was not on defendant restaurant's property during incident); *Shen v. Kornienko*, 253 A.D.2d 396 (1st Dept. 1998); *Sedeno v. Luciano*, 34 A.D.3d 365 (1st Dept. 2006).

Here, plaintiff testified that Max was tied to a parking meter on the curb outside of Ana's, and plaintiff was not on Ana's premises when Max attacked him. Therefore, Ana's owed no duty to plaintiff when he was bitten, and summary judgment for Ana's is granted.

B. *Liability of O'Leary and Maroto*

A dog owner may be held strictly liable for an injury inflicted by his animal if plaintiff can establish both (1) that the dog had vicious propensities and (2) that the owner knew or should have known of the vicious propensities. *Carter v. Metro North Assoc.*, 255 A.D.2d 251 (1st Dept. 1998). Vicious propensity is defined as "a propensity to do any act that might endanger the safety of the persons and the property of others in a given situation." *Collier v. Zambito,* 1 N.Y.3d 444, 446 (2004). Knowledge of vicious propensities can be established by proving that the owner had notice of prior similar acts. *Collier*, 1 N.Y.3d at 446. A triable issue of fact as to knowledge of a dog's vicious propensities can be raised, even without any proof that the dog had previously bitten someone, with evidence that it was known to growl, snap, or bare its teeth. *Id.* at 447. Dog owners are not entitled to "one free bite". *Id.* at 448. On the other hand, a defendant will not be held liable where there is no evidence that it owned, possessed, harbored, or exercised dominion and control over the dog. *Powell v. Wohlleben*, 256 A.D.2d 396 (2nd Dept. 1998).

Here, defendants argue that O'Leary is entitled to summary judgment because she did not own or exercise any dominion or control over Max. They contend Maroto is the sole owner listed on the dog license. The evidence does demonstrate that Max did live with Maroto. However, Maroto testified that O'Leary was solely responsible for the "control" of Max's health despite the fact that O'Leary claims that she only took Max to the vet "on occasion." However, the records from Max's visits to Westside on November 20, 2002, and Cathedral on November 30, 2003 list O'Leary as the owner and demonstrate that she paid for the visits. There is no mention of Maroto as the owner of the dog on any of these records. Further, there is no evidence that he ever took Max to the vet or attended to any of his health needs. Finally, Dr. Fierman testified that only dog owners are permitted to authorize the euthanization of the animal. O'Leary took Max to be euthanized and paid for it. Although she disputes her signature on the

authorization, when questioned, the authority of a signature is a triable issue. *Martinez v. Mordolo*, 160 A.D.2d 387, 389 (1st Dept. 1990). Deposition testimony also clearly establishes that O'Leary walked Max, and took him running. This, combined with Maroto's testimony, and the veterinary records, create material issues of fact as to how much dominion, control and responsibility O'Leary exercised over the dog and her possible ownership.

Further, issues of fact remain as to whether Max had any vicious propensities and if O'Leary and/or Maroto knew, or should have known of these propensities. O'Leary argues that Max was well behaved during his visits to the vet, only growling and never lashing out or biting anyone. Maroto testified that Max never bit him and never had to be muzzled or disciplined. However, opinion evidence of Dr. Burkes demonstrates that Maroto has a scar on his arm that came from a dog bite similar to the one received by plaintiff. Then too, Dr. Fierman testified that during his examination of Max on October 30, 2003, Max was aggressive, difficult to deal with, and had to be muzzled. Dr. Fierman also testified that during a flea bath Max had to be muzzled and tranquilized because he attempted to bite the doctor and his technician. This testimony creates material issues of fact as to whether or not Max had vicious propensities and whether defendants knew or should have known of these propensities.

C. Worker's Compensation

The Workers' Compensation Board has primary jurisdiction over the issue of the availability of coverage. *Liss v. Trans. Auto Systems Inc.*, 68 N.Y.2d 15, 21 (1986). A plaintiff has no choice but to litigate this issue before the Board. *Liss*, 68 N.Y.2d at 21. The Board must be given the opportunity to determine if a plaintiff's injuries are the result of a compensable accident. *Id.* "The compensation claim is a jurisdictional predicate to the civil action." *Id*; *O'Rourke v. Long*, 41 N.Y.2d 219, 226 (1976).

The Board's decision is a final determination of the controversy between the parties to the hearing. *Liss*, 68 N.Y.2d at 21; Workers Compensation Law § 23. And, any party to the

hearing, who had the required notice and opportunity to be heard, is precluded from relitigating issues decided by the administrative Judge. *Id.*; Workers Compensation Law § 25(3)(b). Since workers' compensation is an exclusive remedy, a Board determination that a plaintiff is entitled to compensation precludes that plaintiff from pursuing a civil remedy for his injuries even against employer-defendants who were not parties to the hearing. *Id.*; *O'Rourke*, 41 N.Y.2d at 227-228. If the Board finds the injuries outside the purview of the Workers' Compensation Law, any party who participated in the administrative hearing is precluded from asserting the affirmative defense of compensation coverage in any ensuing civil action. *Id.*

Here, defendants argue that the action should be dismissed because it is barred by the Workers' Compensation Law. The Court will not stay this motion pending defendants' appeal of the Board's decision. On August 16, 2006, Judge Joani Sedaca issued the Board's decision holding that "the incident did not occur out of and in the course of [plaintiff's] employment" and denied the workers' compensation claim. Therefore, since the Board found the injuries to be outside the purview of Workers' Compensation Law, and defendants were parties to that hearing, they are precluded from asserting this defense.

D. *Punitive Damages*

Punitive damages are available to punish a defendant for outrageous conduct which is malicious, wanton, reckless, or in willful disregard of the rights of others. *Crucey v. Jackall*, 275 A.D.2d 258, 266 (1st Dept. 2000). "An act is wanton and reckless when done under circumstances showing heedlessness and utter disregard for the rights and safety of others." *Gruber v. Craig*, 208 A.D.2d 900, 901 (2nd Dept. 1994). In a tort action, it is not necessary to show that the harm was aimed at the general public as long as the very high standard of moral culpability is met. *Giblin v. Murphy*, 73 N.Y.2d 769, 773 (1998).

Here, the punitive damage demand cannot be dismissed. Defendants argue that there is no evidence on record to support plaintiff's claim for punitive damages. However, issues of fact

remain as to the level of control O'Leary had over Max, whether or not the dog had vicious propensities, and if so, whether Maroto and O'Leary knew, or should have known of these propensities. All of this evidence is relevant towards plaintiff's claim for punitive damages. If it can be established that O'Leary had some level of responsibility and control over Max, than the questions surrounding any vicious propensities that existed, and her possible knowledge of these propensities, are all relevant to the possibility that her behavior and failure to take any precautions constituted wanton and reckless conduct in complete disregard of the rights and safety of others. Also, issues of fact remain as to whether Max had previously bitten Maroto, and whether he indeed was aware of any vicious propensities. Maroto's action of brining a supposed vicious dog to a restaurant and tying it outside without taking any precautions against its violent tendencies could be considered wanton reckless behavior. Accordingly, it is

ORDERED that the motion for summary judgment of Ana's Café, LLC is granted and the causes of action against it are dismissed; and it is further

ORDERED that Antonio Maroto's motion for summary judgment is denied; and it is further

ORDERED that Susan O'Leary's motion for summary judgment is denied; and it is further

ORDERED that the causes of action as against defendant's Maroto and O'Leary are severed and shall continue; and it is further

ORDERED that the parties are to appear before the Court on July 12, 2007 at 9:30 am for a pre-trial conference.

ENTER

DATE: June 26, 2007
New York, NY

J.S.C.