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SHORT FORM ORDER

INDEX No. 04-~~19468~~ 19648
CAL. No. 07-00854-OT

SUPREME COURT - STATE OF NEW YORK
PART - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 10-22-07
ADJ. DATE 1-3-08
Mot. Seq. # 007 - MG caseduisp

NELSON DAVID VALENTIN, Plaintiff, - against - HENRY and JOAN STEGLICH, ELNNIEL DIXON and DONNIEL DIXON, Defendants.	BECKER & AGOSTINO, P.C. Attorneys for Plaintiff 880 Third Avenue New York, New York 10022 ROBERT P. TUSA, ESQ. Attorney for Defendant Henry Steglich 898 Veterans Memorial Highway, Suite 320 Hauppauge, New York 11788 JOAN SEGLICH, ProSe 89 Williams Avenue North Amityville, New York 10022 RUDY SCOTT, ProSe 89 Williams Avenue North Amityville, New York 10022 DARNIA LUCAS, ProSe 89 Williams Avenue North Amityville, New York 10022

Upon the following papers numbered 1 to 7 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 4 - 5 ; Replying Affidavits and supporting papers 6 - 7 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#007) by defendant, Henry Steglich, for an order awarding him summary judgment dismissing the plaintiff's complaint and all cross claims interposed against the moving defendant in this personal injury action is considered under CPLR 3212 and is granted.

Plaintiff commenced this action to recover damages for the personal injuries he sustained on May 5, 2004, when he was attacked in the backyard of his residential premises by two pitbulls

belonging to the Dixon defendants. On the date of the attack, the plaintiff was visiting premises located at 85 Williams Avenue in Amityville, New York. The plaintiff had recently purchased said premises but he did not yet dwell therein. While checking on some plants he previously delivered to the back yard of his new premises, the plaintiff heard some rustling noises behind him. Upon turning around, the plaintiff saw a white pitbull digging under a chain link fence which separated the plaintiff's premises from those next door, at 89 Williams Avenue. The white pitbull crawled underneath the fence as did a second, brown pitbull, whereupon both dogs attacked the plaintiff by biting his legs. The plaintiff broke free and jumped over the fence into an adjacent yard of neighbor. A person emerged from the premises occupied by the Dixon defendants and corralled the dogs and returned them to said premises. The plaintiff returned to his yard and called for medical and police assistance.

The residential premises contiguous to the right of the plaintiff's new house from which the dogs emerged were owned by moving defendant, Henry Steglich. Said defendant did not, however, reside at those premises on May 5, 2004. Rather, the premises were occupied by the Dixon defendants under a written lease, the terms of which, were governed by federal housing regulations. One such term prohibited the harboring of pets absent delivery of the written permission of the landlord to federal housing overseers.

The premises owned by defendant Steglich had fencing in both the front and back yards. According to Mr. Steglich's deposition testimony, he was responsible for all structural repairs on the outside of the house situated on his premises. He didn't recall making any major repairs to any part of the premises in 2004. Defendant Steglich further testified that the fencing surrounding the premises was kept in good condition and was without holes in any section thereof or gaps between the fencing and the ground on which it stood. Mr. Steglich, also testified that while he long resided in Brooklyn, he would periodically visit his rental premises to inspect same. He could not, however, recall the last date on which he visited said premises prior to the plaintiff's attack. Mr. Steglich was not present on the premises on the date of plaintiff's attack. At no time during the two year occupation of the premises by co-defendants Dixon, did defendant Henry Steglich witness the harboring of any dogs thereon nor did he receive any complaints about dogs on the premises. Defendant Steglich was not asked for nor did he issue any writing permitting the Dixons to keep dogs on the premises.

Defendant Henry Steglich now moves for summary judgment dismissing the plaintiff's complaint and any cross claims that may have been interposed against him.[1] The motion is grounded on claims that the absence on the part of the moving defendant of any knowledge of the presence of the subject dogs on his premises or their possession of any vicious propensities precludes any finding of liability under either of the plaintiff's pleaded theories of recovery, namely strict liability and common law negligence.

Plaintiff's opposition to the motion is principally predicated upon claims that the moving defendant, notwithstanding his status as an out-of-possession landowner, breached the duty imposed upon him by maxims of common law of negligence which mandate all landowners to maintain their

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[1]The court is unaware of any appearances in this action by any of the other defendants named in the caption.

premises in a reasonably safe condition free from defects and other unsafe conditions. The plaintiff further claims that the moving defendant is chargeable with, at the very least, constructive knowledge of the vicious propensities of both of the pitbulls that attacked the plaintiff and is thus liable under theories of strict liability.

To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises, (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog (***Ali v Weigand***, 37 AD3d 628, 830 NYS2d 354 [2007], citing ***Baisi v Gonzalez***, 97 NY2d 694, 739 NYS2d 92 [2002]; ***Young v Tirrell***, 1 AD3d 509, 767 NYS2d 121 [2003]; ***Mehl v Fleisher***, 234 AD2d 274, 650 NYS2d 784 [1996]). A defendant landlord who makes a *prima facie* showing of the absence of notice of the harboring of dogs on his or her property which is not controverted by the plaintiff, is entitled to an award of summary judgment dismissing the plaintiff's strict liability claims (***Madaia v Petro*** 291 AD2d 482, 738 NYS2d 676 [2002]; *see also,* ***Smedley v Ellenwood,*** 21 AD3d 676,799 NYS2d 682 [2005]).

The foregoing principles by which a person who neither owns the subject dog nor has custody thereof such as, an out-of-possession landlord, are derived from both traditional theories of premises liability and strict liability precepts applicable to the owners or custodians of dogs that cause injury to persons. Where the owner or custodian of the dog is chargeable with strict liability, the situs of the accident is irrelevant, and the owner or possessor will be liable even if the attack occurs on the property of another (*see,* ***Faller v Schwartz***, 303 AD3d 756 NYS2d 641[2003]; ***Silva v Micelli***, 178 Ad2d 521 577 NYS2d 444 [1991]). Where, however, an out-of-possession landowner or other non-owner of the subject dog is charged with liability for injuries caused by a dog attack, strict liability will not attach where the attack did not occur on premises owned by said out-of-possession landowner or other non-owner of the dog (*see,* ***Williams v City of New York***, 306 AD2d 203, 761 NYS2d 221 [2003]). In such cases, a landowner or other person may be liable under principles of common law negligence but only if they created or contributed to the creation of the unsafe condition on the premises belonging to third-parties whereat the plaintiff's injuries were sustained (*see*, ***Galindo v Town of Clarkston***, 2 NY2d 633, 781 NYS2d 249 [2004]; ***Bhandari v Isis***, 45 AD3d 619, 846 NYS2d 266 [2007]; ***Galperina v Mandelbaum***, 27 AD3d 520, 813 NYS2d 122 [2006]).

Here, the plaintiff's attack occurred in the backyard of his residential premises when two dogs harbored by tenants in possession of the moving defendant's adjacent premises escaped through one more holes dug by said dogs under a fence that separated the moving defendant's yard from the yard of the plaintiff. The record is devoid of any evidence tending to establish that the moving defendant created or contributed to the creation of a dangerous condition on the premises of the plaintiff, namely, the presence of the two pitbulls in the plaintiff's backyard, by the defendant's engagement in affirmative acts of negligence or by reason of any actionable failure on his part to maintain his premises. Defendant Steglich is thus entitled to summary judgment dismissing so much of the plaintiff's claims that charge the moving defendant with liability under principles of common law negligence..

In addition, the moving defendant demonstrated, *prima facie*, that he was without notice that one or more of the subject dogs were being harbored on his premises. The opposing papers submitted by the plaintiff failed to establish, by proof in admissible form, the existence of questions of fact on the issue of

the moving defendant's notice of the dogs' presence on the subject premises. Plaintiff's claim that the moving defendant is chargeable with constructive notice of the presence of the subject dogs on his premises is unsupported by any evidence of the existence of facts necessary to charge an out-of-possession landowner with constructive notice (*see, **Smith v New York City Housing Authority***, 304 AD2d 646, 757 NYS2d 603 [2003]; *Cf., **Bennett v White,*** 37 AD3d 630, 830 NYS2d 352 [2007]). The defendant is thus entitled to an award of summary judgment dismissing the remaining claims of the plaintiff which sound in strict liability.

In view of the foregoing, the instant motion (#007) by defendant Henry Steglich for summary judgment dismissing the plaintiff's complaint is granted. Upon receipt of this order, the Clerk of the Calendar department shall mark this action disposed, since it does not appear that any cognizable claims interposed herein remain unresolved.

Dated: 5 February 2008

J.S.C.
JEFFREY ARLEN SPINNER

X FINAL DISPOSITION ___NON-FINAL DISPOSITION