SHORT FORM ORDER

INDEX No. 01-15393
CAL. No. 07-01182-OT

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9-5-07
ADJ. DATE 10-10-07
Mot. Seq. # 005 - MG

BLANCA CRUZ-OSORIO, individually, and as mother and natural guardian for WILLIAM CRUZ OSORIO,	MARIO DeMARCO, ESQ. Attorneys for Plaintiffs 8 South Main Street Port Chester, New York 10573
Plaintiffs,	NATHANIEL HARRIS, ProSe 66 East Halley Lane Central Islip, New York 11722
- against -	RICHARD T. LAU & ASSOCIATES Attorneys for Defendant Sophie Cavallaro P.O. Box 9040 Jericho, New York 11753-9040
NATHANIEL HARRIS, SALVATORE CAVALLARO, SOPHIE CAVALLARO, IRVING APGAR and DIANE APGAR,	LOCCISANO & LARKIN Attorneys for Defendants Apgar 150 Motor Parkway, Suite 405 Hauppauge, New York 11788
Defendants.	

Upon the following papers numbered 1 to 21 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14 - 18 ; Replying Affidavits and supporting papers 19 - 21 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Sophie Cavallaro for summary judgment dismissing the complaint against her is granted.

This is an action to recover damages for personal injuries allegedly suffered by infant plaintiff William Cruz Osorio on July 26, 1998, when he was bitten by a dog while visiting the premises known as 10 East Halley Street, Central Islip, New York. Plaintiff Blanca Cruz-Osorio, infant plaintiff's mother, sues to recover for loss of services. The dog that allegedly bit infant plaintiff was owned by defendant Nathaniel Harris, who resided at premises known as 66 East Halley Street, Central Islip, New

York. At the time of the subject incident, the premises at 66 East Halley Street was owned by defendants Sophie Cavallaro and Salvatore Cavallaro, and leased by a third party, Marsha Harris. The court notes that defendant Salvatore Cavallaro passed away after the commencement of this action. On February 7, 2005, this Court granted defendant Sophie Cavallaro a default judgment on her cross claim against defendant Harris. Thereafter, on November 16, 2005, a stipulation was executed discontinuing the claims against defendants Irving Apgar and Diane Apgar.

Defendant Sophie Cavallaro (hereinafter Cavallaro) now moves for summary judgment dismissing the claim against her on the grounds that she did not have possession or control of the premises at 66 Halley Street, and that she did not have any notice that defendant Harris's dog possessed vicious propensities. In support of the motion, Cavallaro submits copies of the pleadings and transcripts of her deposition testimony and the deposition testimony of both plaintiffs. Plaintiffs oppose the motion, arguing that issues of fact exist as to whether Cavallaro had notice that the dog posed a danger, and whether she retained control over the leased premises. In opposition, plaintiffs submit their own affidavits and a transcript of Cavallaro's deposition testimony.

At her deposition, Cavallaro testified, in relevant part, that Marsha Harris leased the premises at 66 East Halley Street under the Section 8 housing program administered by the United States Department of Housing and Urban Development (HUD). She testified that defendant Harris and Marsha Harris were living at the premises at 66 East Halley Street in July 1998, and that she had observed a "big dog" at the premises during Ms. Harris's tenancy. Cavallaro testified that while she remembered seeing the dog in the backyard, she did not know whether she saw it before or after the subject incident. She further testified that she did not have any conversations with either defendant Harris or Ms. Harris about whether they were permitted to keep a dog on the premises or the dog's history. Moreover, Cavallaro testified they she did not receive any complaints about the dog.

Infant plaintiff testified at his deposition that on the date of the incident his mother had brought him over to play with his friend, who lived at 10 East Halley Street. Infant plaintiff, who was six years old when the incident occurred, testified that as he and his friend were standing in the driveway of his friend's house, a young boy walked into the driveway. He testified the boy was walking a dog on a leash, and that he asked the boy if he could pet the dog. Infant plaintiff testified that after petting the dog on its head and nose without incident, the dog suddenly jumped up and bit his upper arm. He testified that he fell to the ground, and that the dog then bit the back of his right thigh and buttocks. He also testified that a couple of months after the subject incident he learned that the same dog bit his friend, Corey Ward, on the wrist.

Infant plaintiff's mother, plaintiff Blanca Cruz-Osorio, testified that her friend, Maggie Rivas, lived with her family at the premises at 10 East Halley Street on the date of the subject incident. She testified that she left infant plaintiff and his cousin at Ms. Rivas' home while she went to pick up items from a local store. She testified that when she returned approximately 30 minutes later, there was an ambulance in front of the Rivas' home and infant plaintiff was lying on a stretcher. Plaintiff Cruz-Osorio testified that she did not have any knowledge of the dog biting or injuring anyone before the subject incident.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to present evidence establishing the existence of a material question of fact requiring a trial (***Alvarez v Prospect Hosp.***, *supra*, at 324, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The opposing party must meet this burden by producing evidentiary proof in admissible form, or by demonstrating a reasonable excuse for failing to meet the requirement of tender in admissible form (*see,* ***Zuckerman v City of New York***, *supra*). "It is incumbent upon a [party] who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in [the complaint] are real and are capable of being established upon a trial" (***Di Sabato v Soffes***, 9 AD2d 297, 301, 193 NYS2d 184 [1st Dept 1959]).

A plaintiff seeking to hold an out-of-possession landlord liable for injuries sustained as a result of an attack by a tenant's dog must demonstrate that caused by a tenant's dog unless the landlord (1) had notice that the dog was being harbored on the premises, (2) knew or should have known of the dog's vicious propensities, and (3) retained sufficient control over to premises such that he or she could have required that the animal be confined or removed (*see,* ***Ali v Weigand***, 37 AD3d 628, 830 NYS2d 354 [2d Dept 2007]; ***Bennett v White***, 37 AD3d 630, 830 NYS2d 352 [2d Dept 2007]; ***Mehl v Fleisher***, 234 AD2d 274, 650 NYS2d 784 [2d Dept 1996]). Further, a landlord cannot be held liable for injuries caused by a tenant's dog if the incident did not occur on the landlord's premises (*see,* ***Sedeno v Luciano***, 34 AD3d 365, 824 NYS2d 294 [1st Dept 2006]; ***Braithwaite v Presidential Prop. Servs., Inc.***, 24 AD3d 487, 806 NYS2d 681 [2d Dept 2005]).

Cavallaro's submissions show that she was an out-of-possession landlord of premises leased to a tenant under the federal Section 8 program. Although she testified that she knew a large-sized dog was living at the premises during Marsha Harris's tenancy, she also testified that she had no knowledge that the dog had any vicious propensities. Moreover, the deposition testimony of both plaintiffs shows the subject attack took place not at the premises on East Halley Street owned by Cavallaro, but at premises rented by plaintiff Cruz-Osorio's friend, Maggie Rivas. Cavallaro, therefore, demonstrated prima facie her entitlement to summary judgment as a matter of law (*see,* ***Ali v Weigand***, *supra*; ***Braithwaite v Presidential Prop. Servs., Inc.***, *supra*; ***Bemiss v Acken***, 273 AD2d 332, 709 NYS2d 592 [2d Dept], *lv denied* 95 NY2d 764, 716 NYS2d 38 [2000]; *cf.* ***Baisi v Gonzalez***, 97 NY2d 694, 739 NYS2d 92 [2002]), and shifted the burden to plaintiffs to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see,* ***Alvarez v Prospect Hosp.***, *supra*).

Here, plaintiffs' submission in opposition do not discuss the fact that the subject incident occurred on property not owned by Cavallaro. Further, plaintiffs failed to submit evidence in admissible form raising a question as to whether Cavallaro knew or should have known that defendant Harris's dog possessed vicious propensities (*see*, ***White v Kings Vil. Corp.***, 21 AD3d 485, 799 NYS2d 747 [2d Dept 2005]; ***Sers v Manasia***, 280 AD2d 539, 720 NYS2d 192 [2d Dept], *lv denied* 96 NY2d 714, 729 NYS2d 441 [2001]). The Court notes that the vague, unsubstantiated statement in the affidavit by infant plaintiff that defendant Harris's dog "bit another person, Corey Ward, on his arm" does not raise a

question as to whether Cavallaro had knowledge that the dog possessed vicious propensities (*see,* ***Harris v Kasperak***, 172 AD2d 1062, 569 NYS2d 318 [4th Dept 1991]; *cf.* ***Baisi v Gonzalez***, *supra*; ***Bennett v White***, *supra*).

Accordingly, defendant Cavallaro's motion for summary judgment is granted. The action as against defendant Harris is severed and continued.

Dated: FEB 07 2008

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**