

McEnaney v Bargman
2009 NY Slip Op 31194(U)
May 19, 2009
Supreme Court, Nassau County
Docket Number: 8294/07
Judge: Thomas Feinman
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

KRISTEN McENANEY,

Plaintiff,

- against -

CARLTON BARGMAN and BERNARD R.
CLEOPHAT,

Defendants.

TRIAL/IAS PART 18
NASSAU COUNTY

INDEX NO. 8294/07

MOTION SUBMISSION
DATE: 5/8/09

MOTION SEQUENCE
NOS. 1, 2

The following papers read on this motion:

- Notice of Motion and Affidavits..... X
- Notice of Cross-Motion and Affidavits..... X
- Affirmations in Opposition..... X
- Reply Affirmation..... X

The defendant, Bernard R. Cleophat, (hereinafter referred to as "Cleophat"), moves for an order pursuant to CPLR §3212 granting the defendant summary judgment dismissing plaintiff's complaint as to Cleophat, and any and all cross-claims against Cleophat. The plaintiff submits opposition. The defendant, Cleophat, submits a reply affirmation.

The defendant, Carlton Bargman, (hereinafter referred to as "Bargman"), cross-moves for an order pursuant to CPLR §3212 granting Bargman summary judgment dismissing plaintiff's complaint as and against Bargman, and any and all cross-claims as and against Bargman. The plaintiff submits opposition. The defendant, Bargman, submits a reply affirmation.

The plaintiff initiated this action to recover for personal injuries sustained on April 2, 2007 when she was attacked and bitten by a pit bull named "Bullet". The incident occurred in the basement apartment occupied by the defendant, Bargman and his girlfriend, non-party, Tara Yanoti, in a house owned by the defendant, Cleophat, located at 40 Searing Street, Hempstead, New York.

The defendant, Cleopha, submits that while he does not concede that Bullet is a pit bull, he was unaware that Bullet was a pit bull. Cleopha provides that there was no lease in effect between Cleopha and Bargman, however, he did accept money from Bargman, albeit, it was not on a "continuous" month to month basis. Cleopha submits that Bargman had exclusive possession and control of the basement apartment, and that Cleopha had no knowledge that Bullet possessed any dangerous proclivities or vicious propensities. Cleopha argues that the mere fact that he believed that Bargman kept Bullet in a cage in his apartment is not sufficient knowledge of Bullet's alleged vicious propensities.

The defendant, Bargman, by way of cross-motion, supports Cleopha's motion, and submits that Bargman had no prior notice that Bullet had any vicious propensities. The defendant asserts he is not the owner of Bullet, that Bullet belongs to his girlfriend, Tara Yanoti. Bargman submits that Tara Yanoti told him that Bullet was a "Lab/Staffordshire Mix". Bargman asserts that "the fact that a cage or choke collar is utilized on a few occasions" on Bullet has no relevance to vicious propensities.

The plaintiff, in opposition to the motions, provides that on the day of the incident, she was invited to visit the defendant, Bargman, and his girlfriend, Tara Yanoti, who resided in the basement apartment at 40 Searing Street, Hempstead, New York. Plaintiff arrived at the apartment and Bullet "peed" on her feet. Plaintiff submits that this act was a red flag to Bargman that the dog was agitated, and that Bargman should have put Bullet in his cage, as he had done on previous occasions. Later that evening, while the plaintiff was sitting on the floor, the plaintiff claims that Bullet, unprovoked, attacked her, bit her face twice, and latched onto her face, whereby the defendant, Bargman, had to punch Bullet to get him to release his jaws from her face. The plaintiff ran to the sink, saw blood everywhere and part of her face hanging off and grabbed a dishtowel to hold it together. The plaintiff sustained open wound injuries to her face, nose, lip, head and hand with permanent scarring.

The plaintiff avers that Cleopha was aware that the defendant, Bargman, kept Bullet in the basement apartment as a "guard dog" for protection, knew that Bullet was kept in his cage, and that Bullet had a choke collar. The plaintiff avers that Bargman told the plaintiff that Bullet attacked another dog in front of Bargman's prior residence whereby the police were called. The plaintiff submits that Bargman "bragged about it". The plaintiff also avers that Bargman told her that Bullet attacked a rabbit while residing at the subject premises and that he had to take Bullet to the veterinarian for treatment. The plaintiff provides that Bargman told the plaintiff on several occasions that Bullet was used as a guard dog.

The defendants each refuse to acknowledge that Bullet is a "pit bull". Cleopha states that he does not know what breed the dog is. Bargman testified that Tara Yanoti told him that Bullet was a "Lab/Staffordshire Mix", that Tara Yanoti purchased the dog, and told him that she purchased the dog in Florida. However, Tara Yanoti testified that Bargman owned the dog, that when she met Bargman he had the dog, and during the brief period that she moved out of the basement apartment, Bullet remained with Bargman in the apartment. The plaintiff testified that Bargman told her that Bargman owned the dog. In any event, the veterinarian hospital records provide that Bullet is an "American Pit Bull" who weighed approximately 58 pounds at the time of the incident. The veterinarian hospital records also provide that prior to the incident, Bullet's left front foot was swollen and raw, that he hurt his left front paw and sustained cuts between his toes for a few days. The plaintiff submits the record corresponds to the time that Bargman told her that Bullet attacked a rabbit.

The plaintiff provides that Cleopha and Bargman had access to a duplicate set of keys to the house and apartment. Cleopha admits to having been present in the basement apartment with Bargman, Bargman's girlfriend, the plaintiff and Bullet, yet asserts that it was only that one time. Tara Yanoti testified that plaintiff was attempting to "kiss" Bullet prior to the attack and that Bargman had warned the plaintiff on three or four prior occasions not to go near Bullet's face when food was around.

It is well settled that an "owner of a domestic animal who either knows or should have known of the animal's vicious propensities will be held liable for the harm the animal cause as a result of those propensities". (*Collier v. Zambuto*, 1 NY3d 444). A vicious propensity is the "propensity to do any act that might endanger the safety of persons and property of others in a given situation. (*Id.*, quoting *Dickson v. McCoy*, 39 NY 400). Knowledge may be established with evidence of "prior acts of a similar kind of which the owner had notice". (*Id.*) While it is not necessary to prove a prior bite, (*Bard v. Jahnke*, 6 NY3d 592), proof constitutes knowledge that the dog had been known to "growl, snap or bare its teeth" or evidence showing how the animal was restrained. (*Collier v. Zambuto, supra.*) "In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities - albeit only when such proclivity results in the injury giving rise to the lawsuit." (*Id.*)

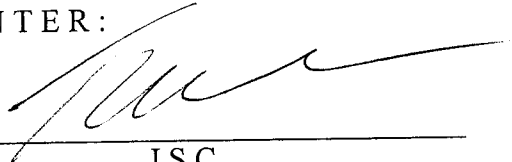
Proof of a vicious propensity may be demonstrated by showing defendant's awareness of a prior vicious act or that the animal had proclivity to act in such a vicious manner. (*Sherman v. Torres*, 35 AD3d 436). An attack that is severe and unprovoked is an indicia of vicious propensities. (*Moriano v. Schmidt*, 133 AD2d 72; *Sherman, supra.*) Even in the absence of a prior bite, a triable issue of fact regarding knowledge of vicious propensities may be raised by other evidence of the dog's aggressive behavior. (*Calabro v. Bennett*, 291 AD2d 616). To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, plaintiff must establish that the landlord had notice that a dog was being harbored on the premises, knew or should have known that the dog had vicious propensities, and had sufficient control of the premises to allow the landlord to remove or confine the dog. (*Bennett v. White*, 37 AD3d 630).

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 165 NYS2d 498). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 413 NYS2d 141). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 200 NYS2d 627. The role of the court is to determine if bonafide issues of fact exists, and not to resolve issues of credibility. (*Gaither v. Saga Corp.*, 203 AD2d 239; *Black v. Chittenden*, 69 NY2d 665).

Viewing the evidence in the light most favorable to the plaintiff, (*Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt, LP*, 7 NY3d 96), questions of fact have been raised regarding whether Bullet had vicious propensities which the defendants had, or should've had, notice of, and with respect to plaintiff's negligence claim, whether the defendants breached the duty of care owed to her by failing to take reasonable measures to prevent the incident at issue, and if so, whether such breach was the proximate cause of the damages alleged. Material issues of fact exist as to whether the homeowner had notice that the tenant was harboring Bullet in his apartment and knew, or should have known, that Bullet had vicious propensities.

In light of the foregoing, the defendants' motion and cross-motion for summary judgment are denied.

ENTER:



J.S.C.

Dated: May 19, 2009

cc: Scott F. Guardino, PLLC
Mark Feldman, Esq.
Martyn, Toher & Martyn

ENTERED

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