SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

KIMBERLY ANNE GONZALES,

INDEX NO.:10795/07

Plaintiff,

MOTION DATE:12-29-08
SUBMIT DATE:6-8-09
SEQ. NUMBER - 002

-against-

FRANK GATT, MARY GATT, TERRENCE M. RYAN, JEAN GRAHAM and DAVID W. SCHEERER a/k/a DAVE SCHEERER

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 11-29-08.....1
Affidavit in Opposition, dated 5-15-09.....2
Reply Affidavit, dated 5-20-09.....3

The motion by the Gatt defendants for summary judgment, CPLR §3212 is granted and the action and any cross claims are dismissed as to them. That portion of the motion which seeks summary judgment in favor of defendant Ryan is denied as said defendant has failed to make a *prima facie* showing of entitlement to relief. Although there is deposition testimony that defendant Ryan, a son of the Gatts, is on the deed as a co-owner and had

nothing to do with maintaining the premises, there has been no evidence submitted by defendants to the status of his knowledge or notice. Reference herein to defendants shall be deemed to refer to the Gatt defendants.

The defendants, owners of premises in Hicksville, New York, leased an apartment to Graham and Scheerer. Plaintiff, while visiting one of Graham's children at the apartment, was bitten and injured by a dog owned by Graham/Scheerer. The Gatts do not reside or conduct any business operations at the location and a second apartment is leased to another.

Defendants retained a limited right to enter the leased premises to examine, make repairs or alterations and to exhibit the premises to prospective lenders, buyers or tenants. The lease also reserves a right to the landlord to enter the premises to make repairs required but not made by the tenants, without imposing an obligation to do so.

Plaintiff, while not disputing that defendants were an out of possession landlords, argues that defendants were on notice of the dangerous habits and propensities of the dog that bit plaintiff.

On a motion for summary judgment, the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (*Frank Corp. v. Federal Ins. Co.*, *supra* at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601.

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist (see *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989)].

The submissions by defendants establish entitlement to judgment thus shifting the burden to the plaintiff to rebut the movants' case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, plaintiff has failed to establish the existence of triable issues of fact and hence, the motion for summary judgment is granted.

Historically, landlords could not be held liable for injuries caused by dangerous conditions on their premises when possession had been transferred. Courts believed that conveyance of possession by lease was similar in effect to conveyance of title. This rule was relaxed so as to impose a duty to remedy dangerous conditions on a landlord who had contractually assumed the responsibility to make repairs. Thus, a landlord may be found liable for failure to cure a dangerous condition on leased premises of which it has notice, if the landlord assumes a duty to make repairs and reserves the right to enter in order to inspect or to make such repairs, *Chapman v. Silber*, 97 NY2d 9, 19 (2001).

Generally, the liability of an out of possession landlord hinges on whether the landlord has retained sufficient control over the premises to be held to have constructive notice of the

condition, *Massucci v. Amoco Oil Co.*, 292 AD2d 351 (1st Dept. 2002) as where the landlord has either contractually or through a course of conduct became obligated to maintain or repair the defective condition. *Melendez v. American Airlines, Inc.*, 290 AD2d 241 (1st Dept. 2002). A landlord who has the right but not the obligation to enter the premises and make repairs at the tenant's expense may also be liable if the dangerous condition constitutes a significant structural or design defect. *Supra.*

Here, there was no obligation on the part of the defendants to make any repairs or perform any maintenance.

Plaintiff does not dispute the law of this state that the owner of a domestic animal will not be held liable for the harm the animal causes as a result of its vicious propensities unless the owner knows or should know of such propensities. Knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the owner had notice or other behavior by the dog or the owner from which an inference of vicious propensities may be made. *Collier v. Zambito*, 1 NY3d 444 (2004).

A landlord may be liable for the attack by a dog kept by a tenant if the landlord has actual or constructive knowledge of the animal's vicious propensities and maintains sufficient control over the premises to require the animal to be removed. That others may have been on notice of a dog's habits does not establish notice to the landlord. *Smedley v. Ellinwood*, 21 AD3d 676 (3rd Dept. 2005); *Wilson v. Livingston*, 305 AD2d 585 (2d Dept. 2003); *see also Strunk v. Zoltanski*, 62 NY2d 572 (1984).

In response, plaintiff alleges that the lease imposes a responsibility upon the tenants for "damages resulting from pet", that the tenant was required "to furnish landlord with proof of apt [sic] insurance due to pet" and she believes that defendants had previously told the tenants that they could not continue to live in the house with the dog because the dog was too dangerous. However plaintiff has not testified as to the source of this information and does not profess to have personal knowledge. Plaintiff has also indicated that there was a prior biting incident but submits no evidence of knowledge or notice of the incident by defendants.

None of the foregoing factors is indicative that the dog had vicious propensities of which the Gatts were aware. *Galgano v. Town of North Hempstead*, 41 AD3d 536 (2d Dept. 2007) and there is no evidence that the Gatts had any knowledge of the prior incident between the dog and plaintiff's high school classmate "Jenna". According to the testimony, the defendants told the tenants that the dog had to go after this incident and not before and there is no evidence to the contrary.

Finally, the requirement that defendants carry liability insurance is not an indication of knowledge of the animal's propensities especially where as here there is no evidence that defendants were familiar with the dog's nature prior to the tenancy. The plaintiff has failed to raise a question of fact that defendants had knowledge or should have known of the dog's propensities. *Ali v. Weigand*, 37 AD3d 628 (2d Dept. 2007); *Madaia v. Petro*, 291 AD2d 482 (2d Dept. 2002); *cf Dykeman v. Heht*; 52 AD3d 767; *Morse v. Colombo*, 8 AD3d 808 (3rd Dept. 2008).

Based upon the foregoing, plaintiff has failed to demonstrate the existence of a triable issue of fact, the motion for summary judgment is granted and the action is dismissed as to the Gatt defendants.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 15, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Raphaelson Law Firm, P.C.
Attorneys for Plaintiff
Pennsylvania Building
14 Penn Plaza, Ste. 407
New York, NY 10122

Martyn, Toher & Martyn
By: Christina A. Leonard, Esq.
Attorney for Defendants Frank Gatt, Mary Gatt and Terrence M. Ryan
330 Old Country Road, Ste. 211
Mineola, NY 11501