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SHORT FORM ORDER

INDEX No. 04-19178
CAL. No. 09-00026-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 28 - SUFFOLK COUNTY

PRESENT:

Hon. MARK D. COHEN
Justice of the Supreme Court

MOTION DATE 5-7-09
ADJ. DATE 5-19-09
Mot. Seq. # 003 - MotD

JANIS EGAN and MICHAEL EGAN, Plaintiffs, - against - DONNA HOM and MARK HOM, Defendants.	MICHAEL B. MILLER, ESQ. Attorneys for Plaintiffs 100 Broadhollow Road, Suite 315 Farmingdale, New York 11735 DUFFY & DUFFY Trial Counsel for Plaintiffs RXR Plaza, Suite 1370 Uniondale, New York 11556 CULLEN & DYKMAN, LLP Attorneys for Defendants 100 Quentin Roosevelt Boulevard Garden City, New York 11530-4850

Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 13; Notice of Cross-Motion and supporting papers ___; Answering Affidavits and supporting papers 14-21; Replying Affidavits and supporting papers 22-22; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the Defendants, Donna Hom and Mark Hom, for an Order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied as to the first cause of action for strict liability and second cause of action for common law negligence on the issue that the Defendants negligently maintained the premises and negligently restrained the dog; is granted as a matter of law as to the third cause of action premised upon the Plaintiff's claim of nuisance and is dismissed with prejudice; and is denied as to the fourth cause of action.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained on June 28, 2003 by the Plaintiff, Janis Egan, at the premises located at 308 South 2nd Street, East Northport, County of Suffolk, State of New York, when she was caused to fall to the ground by the chain used to secure

the dog owned by the Defendants, Mark Hom and Donna Hom. The Plaintiffs have asserted causes of action sounding in negligence in maintaining their premises, strict liability for harboring an animal with known dangerous propensities, maintaining a nuisance, and a derivative claim. It is asserted that the Defendants had actual and constructive notice of the condition that caused the Plaintiff to sustain injury and that they knew of the vicious and hyperactive propensities of their dog.

The Defendants move for summary judgment dismissing the complaint on the basis the Plaintiff was injured when the leash the dog was attached to became tangled with the Plaintiff's legs, the dog did not touch her in any way, and the dog was running around the back yard restrained by a leash and lead and the Plaintiff chose to remain in the yard. They claim they were not negligent, that the dog did not have known vicious propensities and never came into contact with the Plaintiff.

In support of this application, the Defendants have submitted, *inter alia*, an attorney's affirmation, a copy of the summons and complaint, answer, bill of particulars, copies of the transcripts of the examinations before trial of Janis Egan and Michael Egan held on January 13, 2006, Donna Hom held on January 24, 2007, and non-party witnesses Eileen Morris and Robert Thurston held on March 14, 2008.

The Plaintiffs oppose this motion with, *inter alia*, an attorney's affirmation; photographs of the dog and the yard where the incident occurred, and the Plaintiff's medical records.

It is well established that a moving party for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issue of fact. (***Winegrad v New York Univ. Med. Center,*** 64 NY2d 851, 487 NYS2d 316 [1985]). Once there is a prima facie showing, the burden then shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form to establish material issues of fact which require a trial of the action, however, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

In reviewing the submissions of the parties, it is determined that the Defendants have not established prima facie entitlement to summary judgment on the first and second causes of action.

Janis Egan testified at her examination before trial that the incident occurred on June 28, 2003. At home that day, she had a glass of wine around 12:30 p.m. or 1:00 p.m. (red vermouth) when she was having lunch with her husband. She arrived at the Defendants' home between 6:15 p.m. and 6:30 p.m. at South Second Street, East Northport. It was her day off from work and she and her husband, Michael Egan, had been invited by her sister, Donna Hom, for dinner. She usually visited her sister every week for years, but because her sister had a new boyfriend, she was not seeing her as often. She stated Donna Hom had two friends living at her home, Robert Thurston and Eileen Morris. She testified that when she arrived, her husband parked their car in the front of her sister's house, and went to the unfinished dirt driveway on the left side of the house to greet Robert and Eileen who had just arrived home. They then walked to the entrance at the back of the house as the front entrance to the house was never used. She stated Robert Thurston, who had a broken ankle and was using a walking aid, sat down in a chair in the back yard near the back porch, and she was standing talking to him. Her sister's dog, Ani, described as a large mixed breed

who was either six to eight months old or a year and a half, was attached by a chain about six to eight feet in length to a runner (dog line) which wire was about thirty to forty feet long and was attached to both the porch and a tree in the back yard. The runner gave the dog full run of the front part of the back yard to both the right and left. The dog was jumping and greeting Michael and Eileen who went into the house. Ms. Egan stated the dog normally greeted by jumping, and on this date, the dog then ran over towards her and knocked her on her lower legs below the knee with the chain. She tried to grab either the chain or wire, but couldn't remember. She was then jerked and wiped off her feet causing her to fall to the ground. She then testified that she did not know if it was the chain or the wire that hit her legs. She testified that usually when she visited her sister and was in the house that the dog would be placed in a cage in the dining room as the dog jumped all over people and usually greeted her that way. She testified that she had never entered the yard before when the dog was on the runner.

Michael Egan testified concerning to his derivative claim.

Donna Hom testified that she had been married to Mark Hom from 1976 to 2001 and they both owned the property located at 308 Second Street, but he was not living at the house at the time of the incident. She owned the dog, Ani, a mixed lab which she received as a gift from her children when the dog was about four or five months old at the end of January 2003. She stated Robert Thurston and Eileen Morris were staying with her for a little while at the time the incident occurred, but she was responsible for taking care of the dog. She described Ani as "hyperactive-excitable. A little excitable in a happy way," and that she did jump on people "here and there" and that it was "a friendly jump." She calmed down after she came up to a person. She kept the dog inside in a crate when strangers came to visit or placed the dog outside when a lot of people come to visit. When her sister came to visit, which was many times, often once or twice a week depending upon their days off, Ani would be either inside or outside. People usually entered through the back door of her home into her kitchen because that is where people usually congregated. She thought Michael and Janis Egan arrived at her house on June 28, 2003 between about 5:30 p.m to 6:30 p.m. at dinner time. The incident occurred in her back yard as soon as her sister arrived. Ani was outside in the backyard. Attached to Ani's collar was a chain about twelve feet long which was attached to a cable runner about twenty five to thirty feet long which crossed the back entrance. She did not witness the accident. No one else was ever injured by the dog or the runner line and chain prior to this incident. She never received any type of violations or notifications from any governmental agency regarding the dog or the runner. She also testified that she had spoken to her sister earlier on the day of the accident, that her sister sounded a little tipsy, and after the accident her sister sought medical treatment for alcoholism.

Eileen Morris testified at her examination before trial that on June 28, 2003 she had been residing in the home of Donna Hom for approximately two years, paid rent, and that Janis Egan was an acquaintance of hers. She was in the kitchen when the incident occurred and did not see what happened. She observed Janis Egan when Janis arrived with Mike and said Janis Egan was slurring her words a little, was a little off balance, and appeared to be intoxicated, just a little wobbly and was losing her steps by the side of the house before she went into Donna Hom's backyard. She had previously seen Janis Egan intoxicated prior to that date, and had seen her drinking in the morning and in the afternoon and there came a time that she realized Janis Egan had a drinking problem. She described Donna Hom's dog, Ani, as a very playful and friendly dog who liked to jump on people, but was not a mean nor vicious dog. Prior to the incident she saw Janis Egan in the middle of the backyard standing while she, and Michael Egan went into the house. Robert

Thurston remained outside. She was putting things in the refrigerator when she turned around and looked outside and saw Janis lying on the ground on her stomach. She thought she was playing with the dog, but then heard Bob (Robert Thurston) yell for them to come out. Ms. Morris also testified that on a lot of occasions when she went out to get the dog, she would run and sometimes the dog's lead would wrap around her foot.

Robert Thurston testified at his examination before trial that he rented a room at Donna Hom's house and was there at the time of the accident. He stated Eileen did not rent a room there but was over quite often. Since he moved out, however, he does not see Donna or her sister any longer. On June 28, 2003, he was sitting in the backyard in his wheelchair as he had broken his ankle. He saw Janis Egan come around the corner of the house with Mike from the open driveway on the left side of the house. He said they were talking and Janis grabbed the dog's line (that went from the cable to the dog's neck), but he did not know why. The dog was excited so he told her, "I don't think I would do that" "because I could tell she had some drinks in her. She wasn't too straight on her feet. She was kind of like wobbly." She said, "I got it." He further stated, "then she lost her balance; she's on the line going 'oh, oh' and the next thing, the dog darted, then she shot off the line like you shot a bow. She went down on the ground solid. It happened like that." He stated that Janis' speech was slurred and her gait was wobbly. He further stated he thought she had stopped drinking because she used to come over to the house a lot and had a few. He also stated that Janis was a drinker, early morning; and that he observed her drink in the morning at Donna's house in the kitchen. He also indicated that the runner in the back yard extended from the porch in the back of the house to a tree in the backyard, not far from the picnic table where they were. He testified that Janis Egan had been in the yard in the past when the dog was on the runner. He described the dog as weighing about eighty pounds, having a good temperament, a good size dog, a nice dog, not vicious at all, only friendly. He described the dog as playful, excitable, and stated that the dog jumps onto people, unless he knew the person really well. He also stated that the dog was respectful with a stern "no." He testified that he gave a statement to some woman whom he thought was from an insurance company and told her that the dog bolted, that Janis went down to the ground, but "sugar coated it...without the drinking." He stated he really did not want to be involved.

FIRST CAUSE OF ACTION FOR STRICT LIABILITY

To recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities (*see*, ***Petrone v. Fernandez,*** _N.Y.3d_, 2009 WL 1585848 (June 9, 2009); ***Bernsky v. Penz y Whistle Toys, Inc.,*** WL N.Y. 3d, 787, 856, N.Y.S. 2d 154 (2008), ***Bard v Jahnke***, 6 NY3d 592, 815 NYS2d 16 [2006]; ***Collier v Zambito***, 1 NY3d 444, 448, 775 NYS2d 205 [2004]; ***Christian v Petco Animal Supplies Stores, Inc.***, 54 AD3d 707, 708, 863 NYS2d 756 [2nd Dept 2008]; ***Claps v Animal Haven, Inc.***, 34 AD3d 715, 716, 825 NYS2d 125 [2nd Dept 2006]; *see also*, ***Palumbo v Nikirk***, 59 AD3d 691, 874 NYS2d 222 [2nd Dept 2009]). Knowledge of vicious propensities may be established by proof of a dog's attacks of a similar kind of which the owner had notice, or by a dog's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm (*see*, ***Bard v Jahnke***, supra, citing ***Collier v Zambito***, supra). Factors to be considered in determining whether an owner has knowledge of a dog's vicious propensities include 1) evidence of a prior attack, 2) the dog's tendency to growl, snap, or bare its teeth, 3) the manner of the dog's restraint, 4) whether the animal is kept as a guard dog, and 5) a proclivity to act in a way that puts others at risk of harm (*see*, ***Collier v Zambito***, supra; ***Galgano v Town of N. Hempstead***, 41 AD3d 536, 840 NYS2d 794 [2nd Dept 2007]). New York recognizes a cause of action which imposes

strict liability (no proof of negligence necessary) upon owners for injuries inflicted by their vicious dogs, the owners having knowledge thereof and viciousness being defined as prior bites and/or mischievous propensities (***Nardi et al v Gonzalez,*** 165 Misc 2d 336 [City Court of New York, Yonkers 1995]). Knowledge of vicious propensities may be established by proof of a dog's attacks of a similar kind of which the owner had notice, or by a dog's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm (*see*, ***Bard v Jahnke***, supra, citing ***Collier v Zambito***, supra).

With respect to the liability for a domestic animal, such as a dog, 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, ***(Collier v Zambito***, supra). "The owner of a domestic animal who either knows or should have known of an animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" ***(Collier v Zambito***, supra).

In ***Anderson v Carduner,*** 279 AD2d 369, 720 NYS2d 18 [1st Dept 2001], the court vacated the lower court's dismissal of the complaint finding that whether the injury caused when the dog rose up on Plaintiff was reasonably foreseeable based on past behavior of the dog was an issue of fact to be determined by the trier of fact. A known tendency to attack others, even in playfulness, as in the case of an overly friendly large dog with a propensity for enthusiastic jumping up on visitors will be enough to make the Defendant liable for damages resulting from such an act.

In this case, the record establishes that the Defendants had knowledge of the dog's vicious propensities or proclivity for jumping on people, and so did the Plaintiff. All the parties testified that the dog normally greeted by jumping and was excitable but in a friendly way. Here, the Defendants have not established prima facie entitlement to summary judgment as a matter of law dismissing the complaint on the strict liability cause of action as the evidence submitted by the Defendants clearly establishes that the dog, Ani, who weighed about eighty pounds, had a propensity to be playful and jump on people, had the potential of putting others at a risk of harm and that the Plaintiff was aware of the same.

Accordingly, summary judgment is denied with regard to the first cause of action premised upon strict liability. ***Felgemacher v. Rugg,*** 28 A.D. 3d 1088, 814 NYS 2d 452 (2006)

SECOND CAUSE OF ACTION FOR COMMON LAW NEGLIGENCE

In New York, to establish a prima facie case of negligence, a Plaintiff must prove (1) that the defendant owed a duty to Plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. In order to establish the third element, proximate cause, Plaintiff must show that defendant's negligence was a substantial factor in bringing about the injury. If, defendant's negligence were a substantial factor, it is considered to be a "proximate cause" even though other substantial factors may also have contributed to Plaintiff's injury (***Spiegel v Fine Paint Co.*** 2006 NY Misc. LEXIS 2549, 236 NYLJ 51 [Sup. Ct. Nassau County 2006]).

Although the First and Second Departments of the Appellate Divisions of the Supreme Court of New York have allowed recovery for injury caused by domestic animals based on common-law negligence even

In the absence of any proof of the owner's knowledge of prior vicious propensities, the Court of Appeals of New York holds that recovery for injuries caused by domestic animals may proceed only under strict liability standards and not on a common-law negligence theory (***Suchdev v Singh,*** 2006 NY Misc Lexis 3699, 236 NYLJ 105 [Supreme Court of New York, Queens County 2006]). A cause of action for ordinary negligence does not lie against the owner of a domestic animal which causes injury. Rather, the sole viable claim is for strict liability, and to establish such liability, there must be evidence that the animal's owner had notice of its vicious propensities. In the absence of such proof, there is no basis for the imposition of strict liability. (***Alia v Florina et al,*** 39 AD3d 1068, 833 NYS2d 761 [3rd Dept 2007]).

Historically, the Second Department has rejected attempts by Plaintiffs to invoke common law negligence as a basis of liability for a dog bite, the explanation being that liability is not dependent upon proof of negligence in the manner of keeping or confining the animal, but instead is predicated upon the owner's keeping of an animal despite knowledge of the animal's vicious propensities (*see,* ***Ortiz v Bonacquisto,*** 2005 NY Misc Lexis 3363, 233 NYLJ 110 [Supreme Court of New York, Putnam County 2005]; *see also,* ***Roupp v Conrad,*** 287 AD2d 937, 731 NYS2d 545 [3rd Dept 2001]***; Plennert v Abel,*** 280 AD2d 960, 719 NYS2d 918 [4th Dept 2001]***; Smith v Farner, Lynch v Nacewicz,*** 126 AD2d 708, 511 NYS2d 121 [2nd Dept 1987]). In ***Suchdev v Singh,*** 2006 NY Misc Lexis 3699, 236 NYLJ 105 [Supreme Court of New York, Queens County 2006]), the common law negligence claim was dismissed because recent judicial precedent held that recovery for injuries caused by domestic animal could proceed only under strict liability standards.

However, in this case, the Plaintiff's cause of action for common law negligence is the manner, method and placement of the restraints (Leash and runner) on the dog which manner, method and place of placement the Plaintiff claims was negligent. See ***Clifford v. Turkel,*** 7 A.D. 3d 251, 776 N.Y.S 2d 550 (2004). There is no claim of a statutory violation by the Defendants.

"Absent any violation of a statutory duty, it is well settled that one who keeps a vicious dog with knowledge of its vicious nature is presumed negligent if he does not keep the dog from injuring others. A vicious nature includes, biting, jumping on people and running at large in a roadway. Conversely, lack of knowledge of a vicious nature is a complete bar to recovery since a Plaintiff may not establish facts from which an inference of negligence may be drawn. The rule is apparently grounded in concepts of foreseeability and notice. Violation of a rule of an administrative agency or of an ordinance of a local government is some evidence which the jury may consider on the question of Defendant's negligence. Under New York law, where a statute imposes a duty, violation thereof constitutes negligence, and obviates the need to prove the elements of common law negligence. Liability results where the injury is the very occurrence the statute is designed to prevent and the victim is a member of the protected class, provided proximate cause is also shown." (***Ayala et al v Hagemann et al,*** 186 Misc2d 122, 714 NYS2d 633 [Supreme Court of New York, Richmond County 2000]). In ***Petrone v Fernandez supra,*** the court held that "When harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule of strict liability for harm caused by a domestic animal whose owner knows or should have know of the animal's vicious propensities. The Court further stated that "A Defendant's violation of a local leash law is irrelevant in a claim of liability for harm caused by a domestic animal because such a violation is only some evidence of negligence, and negligence is not longer a basis for imposing liability."

In this case, there is no claim that a statute has been violated by the Defendants, but were negligent in creating a dangerous condition on their property. Therefore, this cause of action is properly pleaded under a theory of common law negligence.

Based upon the testimony of the parties it is determined the Defendants have failed to demonstrate prima facie entitlement to summary judgment on the common law negligence cause of action. It is determined that Defendant owed a duty to the Plaintiff based upon her inviting the Plaintiff to her home for dinner when the accident occurred. There are factual issues concerning, however, whether the Defendants breached the duty of care owed to the Plaintiff in that the run used for the dog, Ani, extended from the porch to a tree in the backyard. The porch was near the rear entrance to the house, which entrance most people used to enter the Defendant's home and which entrance the Plaintiff always used. The dog was attached by a chain to that run and had access to the area where people in general entered the defendants' home through the rear doorway. The testimony establishes that the dog is known to jump to greet people when they come over, either inside or outside. Therefore the Defendants have not established prima facie entitlement to dismissal of the complaint on a common law theory of negligence based upon the manner, method and placement of the means used to secure the dog Ani when she was outside.

Accordingly, dismissal of the second cause of action premised upon common law negligence is denied

THIRD CAUSE OF ACTION FOR NUISANCE

Courts have defined nuisance as a "continuing or recurrent pattern or objectionable conduct or a condition that threatens the comfort and safety of others" (*see* ***University Towers Associates v Gibson et al,*** 18 Misc2d 349, 846 NYS2d 872 [Civil Court of the City of New York, Kings County 2007]). In ***Lewis v Stiles,*** 158 AD2d 589, 551 NYS2d 557 [2nd Dept 1990], the Appellate Division held that "the sounds of dogs barking, children frolicking, and the discordant sounds of music and outdoor summer life do not, as a matter of law, rise to the level of substantial and unreasonable interference with the Plaintiffs' use of their own property which would constitute a private nuisance.

In ***Fedick v Fenton***, 166 Misc 707, 2 NYS2d 436 [Supreme Court of New York 1938], where a houseworker employed by the owned tripped over the owner's dog, the housekeeper alleged that despite her requests to confine the dog, the owner failed to do so. The houseworker commenced an action predicated upon both negligence and nuisance. The court held that the dog owner was not guilty of nuisance for permitting his dog to lie about within the confines of his own residence, and the owner was not guilty of negligence because he was under no duty to confine or leash the dog at home.

In the instant action, the Plaintiff predicates the cause of action for nuisance on the basis that the defendants were reckless and careless and negligently breached the duty owing to the Plaintiff and all persons invited to the premises to control the dog in a safe and proper manner, and that the hazardous and dangerous manner of securing Ani constituted a menace and nuisance to personals lawfully invited to the premises. However, the cause of action sounding in nuisance is construed by this Court to be a cause of action premised upon common law negligence and is duplicative of the second cause of action wherein it is claimed that the Defendants were negligent in the manner that the dog was leashed and in failing to prevent a reasonably foreseeable injury caused by the dog's runner and leash and proximity to the doorway which most people entered the Defendants' home (*see,* ***Boreika v Casciola et al,*** 5 AD3d 571, 772 NYS2d 848 [2nd Dept 2004]; ***Ballard v Campbell***, 304 AD2d 780, 757 NYS2d 803 [2003]; ***Collier v Zambito,*** supra)

Nuisance involves an element of positive wrongdoing (***McCluskey v Wile,*** 133 AD 470, 129 NYS2d 455 [1st Dept 1911]). As set forth in ***McCluskey v Wile***, supra, "the distinction between negligence and nuisance is not always easy to make, as the same act frequently constitutes both. Private nuisances are ordinarily considered as injuries to property rights, a wrongful, unreasonable and unlawful use of one's premises, so as to interfere with the comfortable enjoyment of his neighbor's premises. A private nuisance is anything unlawfully or tortuously done to hurt or annoyance of the person, as well as the lands, tenements and hereditaments of another. Nuisance involves the element of positive wrongdoing as distinct from mere acts of carelessness whether of omission or commission." The court continued that where a Plaintiff tripped on a dog lying in the hallway and sustained injuries states a cause of action based upon negligence rather than one for the maintenance of a nuisance as permitting a dog to lie in the hallway of an apartment house does not amount to more than negligence. So to can it be said that permitting a dog to be leashed in a manner that can foreseeably cause injury to others invited onto the property is also negligence, and not nuisance. The instant action does not involve a public nuisance.

Accordingly, the cause of action premised upon the theory of nuisance is deemed to be a cause of action premised upon common law negligence with regard to the place, manner and method in which the defendants' dog was leashed on the run outside the rear entry of the Defendants home and is dismissed with prejudice as duplicative of the second cause of action based upon common law negligence.

DERIVATIVE CAUSE OF ACTION

Since the Defendants have failed to establish prima facie entitlement to summary judgment dismissing the causes of action premised upon strict liability and common law negligence, the fourth cause of action premised upon the Plaintiff spouse's derivative claim must stand.

Accordingly, dismissal of the derivative claim is denied.

Dated: July 1, 2009

J.S.C.

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