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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: 45**

NATALIE CUBA,

INDEX NO.:5727/09

Plaintiff,

MOTION DATE:7-1-10
SUBMIT DATE:8-5-10
SEQ. NUMBER - 001

-against-

ESTEBAN VEGA, JR., and MELVIN JORGE,

Defendants.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 6-1-10.....1
Affirmation in Opposition, dated 7-9-10.....2
Reply Affirmation, dated 8-4-10.....3

Motion of defendants for summary judgment pursuant to CPLR §3212 is granted to the extent that plaintiff's common law cause of action is dismissed, and is denied to the extent that plaintiff asserts a cause of action for medical costs pursuant to Agriculture and Markets Law §121.10.

Plaintiff Natalie Cuba alleges that on July 19, 2007, while walking along Oakley Avenue, Elmont, New York, she was attacked and bitten by defendant's dog, a Chihuahua named Lucky, one of three dogs which had gotten out of Vega's yard via an unlocked gate.

Defendant's motion is supported by examinations before trial of both defendants, which attest to Lucky's lack of any vicious propensities, and the absence of any prior vicious

or dangerous conduct on his part, as well as the plaintiff's deposition and affidavit. The Court has not considered reports of Dr. Aranda, a psychologist, because they have not been authenticated or are not in affidavit form. CPLR §2106.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must

come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York,* 49 NY2d 577, *supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.,* 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987).

With respect to cases involving injuries by reason of the action of domestic animals, the law is:

> " that owners of domestic animals could be held strictly liable for harm caused by an animal, where it is established that the owner knew or should have known of the animal's vicious propensities and harm is caused as a result of those propensities. The strict liability rule can be traced back to the 1816 case of *Vrooman v. Lawyer*, 13 Johns 339. Knowledge of vicious propensities may be established by proof of an animal's attacks of a similar kind of which the owner had notice, or by an animal's prior behavior that, while not necessarily considered dangerous or ferocious, nevertheless reflects a proclivity to place others at risk of harm. 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." *Petrone v. Fernandez*, 53 AD3d 221,225 (2d Dept. 2008), citing *Bard v. Jahnke*, 6 NY3d 592 (2006) *rev'd on other grounds*, 12 NY3d 536 (2009).

This rule of law was recently reaffirmed in *Ayres v. Martinez*, 74 AD3d 1002 (2d Dept. 2010).

In *Petrone, supra*, the Court of Appeals in reversing, held that liability of an owner is determined *solely* by application of the above rule, and emphasized that the cause of action is not based on a theory of negligence but on a rule of strict liability. Rejected as irrelevant was the plaintiff's claim also asserted here that negligence should be applied where an owner violates a local leash law. *Id* at 550.

By way of its submission, defendant has established a *prima facie* case for summary judgment as to the strict liability claim. In opposition, plaintiff has failed to demonstrate the presence of a triable issue of fact with regard to knowledge or notice of vicious propensities. *Collier v. Zambito,* 1 NY3d 444, 446-447 (2004); *see Bard v. Jahnke*, 6 NY3d 592, *supra*;

Palumbo v. Nikirk, 59 AD3d 691 (2d Dept. 2009); *cf., Dykman v. Heht*, 52 AD3d 767 (2d Dept. 2008).

Moreover, it was not foreseeable that a failure to lock the yard gate would lead to this incident or that such failure violated a duty of care to the plaintiff. *Darby v. Compagnie National Air France*, 96 NY2d 343 (2001); *532 Madison Ave. Gourmet Foods, Inc.* v. *Finlandia*, 96 NY2d 280 (2001).

Although not pleaded as a cause of action in the complaint, plaintiff, by way of her assertion of a claim that she incurred medical expenses has asserted a claim under Agriculture and Markets Law §121.10. That section, as quoted below and read in conjunction with the definition of a "dangerous dog" as set forth in Agriculture and Markets Law §108.24, imposes a statutorily created liability for medical costs upon the owner of such dog for medical costs, as follows:

> "10. The owner or lawful custodian of a dangerous dog shall, except in the circumstances enumerated in subdivisions four and eleven of this section, be strictly liable for medical costs resulting from injury caused by such dog to a person, companion animal, farm animal or domestic animal."

The definition of a dangerous dog has been interpreted to require a finding of such condition by a court. *See Town of Hempstead v. Lindsey*, 25 Misc.3d 1235(A) (Dist. Ct. Nassau Cty. 2009). However, Agriculture and Markets Law §121.10, unlike the section which precedes it, does not require that a dog was previously found to be a "dangerous dog" as a condition to holding the owner strictly liable for medical costs.

People v. Jornov, 65 AD3d 363 (4th Dept. 2009), which reversed a euthanization order, dealt with §121.2, which requires a dangerous dog determination as a precondition to how the

dog will be punished for its aberrant behavior. But the omission of a predicate finding of dangerousness from the medical cost provision leads to the conclusion that the Legislature intentionally created a cause of action for medical costs resulting from an injury caused by a dog to a person (and certain animals) and that liability for such costs may be established simply by showing an attack without justification, which is the definition of a "dangerous dog" under §108.24. *Budway v. McKee*, 27 Misc.3d 316 (Sup. Ct. Nassau Cty. 2010); *Christensen v. Lundsten*, 21 Misc.3d 651 (Dist. Ct. Suffolk Cty. 2008).

Despite the failure to have pleaded a cause of action for relief under the Agriculture and Markets Law, a plaintiff may oppose a motion for summary judgment by relying on an unpleaded cause of action. *Falkwoski v. Krasdale Foods, Inc.*, 50 AD3d 1091 (2d Dept. 2008). Here the facts recited in the complaint, the Bills of Particulars and the opposition to this motion and the plaintiff's own deposition testimony as to the circumstances of the incident and medical costs incurred or to be incurred, are sufficient to raise an issue of fact as to a claim based on Agriculture and Markets Law §121.10.

Based on the foregoing, plaintiff's common law cause of action is dismissed. However, the motion is denied to the extent that plaintiff has raised a statutory claim for medical costs and demonstrated the presence of issues of fact with respect to such claim.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: August 6, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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