

**Murray v Genoese**

2010 NY Slip Op 32572(U)

September 15, 2010

Supreme Court, Nassau County

Docket Number: 17121/08

Judge: Daniel R. Palmieri

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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  
**HELEN MURRAY and JOSEPH MURRAY,**

**TRIAL TERM PART: 45**

**Plaintiff,**

**INDEX NO.:17121/08**

**-against-**

**MOTION DATE:5-13-10**

**SUBMIT DATE:9-13-10**

**SEQ. NUMBER - 001**

**MARY GENOESE, BRUCE GENOESE,  
WILLIAM GENOESE AND BRUCE DUIGNAN,**

**Defendants.**

-----x

**The following papers have been read on this motion:**

- Notice of Motion, dated 5-13-10.....1**
- Affirmation in Opposition, dated 8-13-10.....2**
- Reply Affirmation, dated 9-10-10.....3**

Motion of defendants Mary Genoese and Bruce Duignan (who is the same person as Bruce Genoese) for summary judgment pursuant to CPLR §3212 is granted and the complaint and any cross claims against them are dismissed. The action continues as to defendant William Genoese.

Plaintiff Helen Murray alleges that on March 21, 2008, while walking along the sidewalk in front of 11 Forest Avenue, Massapequa, New York, she was attacked by a Mastiff owned by William Genoese which had gotten out of the yard by jumping the fence.

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The premises are leased to William Genoese, who has exclusive possession, by defendant Mary Genoese, his sister. Defendant Bruce Duignan is the husband of Mary Genoese and has no ownership interest in either the premises or the dog.

This motion is supported by examinations before trial of all three defendants, which attest to the lack of knowledge by the movants of any vicious propensities, or prior vicious or dangerous conduct on the part of the dog, as well as the depositions of both plaintiffs.

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*,

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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 claim (not asserted here) that negligence should be applied where an owner violates a local leash law. *Id* at 550.

Where, as here, a landlord has surrendered control and possession of premises leased to a tenant the landlord will not be liable for injuries sustained as a result of an attack by a tenant's dog unless she had knowledge of the vicious propensities of the dog and had control of the premises or other capability to remove or confine the animal. *Mehl v Fleisher*, 234 AD2d 274, 275 (2d Dept. 1996). See also *Ali v Weigand*, 37 AD3d 628 (2<sup>nd</sup> Dept. 2007).

By way of their submission, defendants have established a *prima facie* case for summary judgment. In opposition, plaintiff's have 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).

Although not pleaded as a cause of action in the complaint, plaintiffs, by way of their assertion of a claim that they incurred medical expenses have 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 or lawful guardian 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.”

However, here there is no evidence that the moving defendants were either the owners or lawful custodians of the dog and the Court declines to extend the reach of the statute to an out of possession landlord who lacks knowledge and the means of control of the dog.

Here, plaintiff has failed to demonstrate any question of fact with regard to knowledge by the owner landlord movant of any dangerous or vicious propensities or that she had any means of control. As to Duignan, it has not been controverted that he is neither the owner of the dog or the involved premises. Co-defendant William Genoese has not opposed this motion.

Based on the foregoing, the motion is granted and the complaints and any cross claims are dismissed as to the movants.

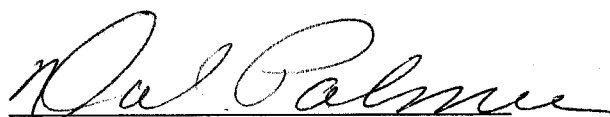
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7.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 15, 2010



HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**ENTERED**

SEP 17 2010

**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**

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