

Khader v New York City Hous. Auth.

2010 NY Slip Op 33657(U)

November 30, 2010

Supreme Court, New York County

Docket Number: 115986/08

Judge: Kathy J. King

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SCANNED ON 12/3/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J GISCHE
Justice

PART 10

Index Number : 115986/2008
KHADER, KIESHA
vs.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

DEC 02 2010

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Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: NOV 30 2010

HON. JUDITH J. GISCHE J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Kiesha Khader,

Plaintiff (s),

-against-

New York City Housing Authority,

Defendant (s).

-----X

New York City Housing Authority,

Third-Party Plaintiff,

-against-

Rafael Rojas and Julia Santiago,

Third-Party Defendants.

-----X

New York City Housing Authority,

Second Third-Party Plaintiff,

-against-

Desiree Reyes,

Second Third-Party Defendant.

-----X

DECISION/ ORDER
Index No.: 115986/08
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische

Third-Party Index No.:
590588/09

FILED

DEC 02 2010

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Second Third-Party Index
No.: 590776/09

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Notice of Motion, JPT affirm., RH affd., exhibits.....	1
MD affirm in opp.....	2
JPT reply affirm.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Defendant, the New York City Housing Authority ("NYCHA") has moved for summary judgment dismissing the complaint. Issue has been joined in the case in chief¹ and the motion was timely brought within 120 days of the filing to the Note of Issue. The motion is, therefore, properly before the court for consideration. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

The underlying summons and complaint, as amplified by plaintiff's Verified Bills of Particulars allege that on June 19, 2008 she suffered serious personal injuries after being attacked by a pit bull that was harbored in apartment 12 E located at 711 FDR Drive, New York, New York ("building"). NYCHA is the landlord of the building. The claimed basis for NYCHA's liability in this case is that it permitted a vicious dog to remain at the building for an unreasonably period of time and that it failed to advise the tenant or otherwise take appropriate measures to remove the dog or warn others about the dog.

NYCHA claims that it is entitled to summary judgment because it did not know about the dog and, consequently, did not know about the dog's vicious propensities.

¹The defendants in the third party actions have defaulted. See Decision/Order dated March 8, 2010.

Summary of the Facts

Plaintiff testified at both a deposition and a 50H hearing. She testified that on June 19, 2008 she was attacked by a pit bull while she was visiting apartment 12E at the building. The tenant of record of the apartment is Julia Santiago, who lives there with Rafael Rojas. Santiago and Rojas are the owners of the dog. Plaintiff went to the apartment to visit Santiago the day she was attacked. Santiago, however, was not at the apartment. Instead plaintiff met and spent time with Desiree Reyes, who witnessed the attack. Plaintiff testified that although she knew Santiago for sometime before the attack, the day of the attack was the first time she learned that Santiago had a dog. She had no affirmative knowledge about whether NYCHA knew about the dog before the attack.

Through the deposition testimony of Joseph Suber, the Assistant Superintendent of the building and the affidavit of Assistant Building Manager, Robert Hamilton, NYCHA has established the following facts:

NYCHA has a specific set of policies and rules applicable to residents that keep pets in NYCHA housing. These policies and rules are contained in the leases signed by tenants. Tenants are not allowed to keep pets in their apartments unless they notify NYCHA of the presence of a pet. This process is referred to as a registration of the pet with NYCHA. In all events, tenants are not entitled to keep pets in NYCHA apartments that weigh over 25 pounds.²

²There is testimony by plaintiff that Ms. Santiago's dog exceeded that 25 pound weight limit. This testimony is supported by non-party witness Gerald Colon who testified that Ms. Santiago's dog weighed 45 pounds.

Mr. Hamilton personally reviewed the tenant file for Julia Santiago. Based upon both his review and personal recollection, Mr. Hamilton affirmatively states that Julia Santiago never notified NYCHA of the presence of a dog in her apartment before the date of the attack. He further states that there were no notifications or complaints in the file concerning the presence of a dog.

When plaintiff was requested to amplify her claim of actual or constructive notice whether in the bill of particulars or discovery, no such amplification was made.

A deposition of Gerald Colon, a non-party was also taken in this case. Mr. Colon testified that he was bitten by Ms. Santiago's dog sometime in 2003. At that time Ms. Santiago was living in a different NYCHA building in the Bronx. Mr. Colon testified that he did not seek any medical treatment for the bite and did not report the incident to the police. There is no affirmative statement by Mr. Colon that he reported the incident to NYCHA. Mr. Colon also testified that Ms. Reyes was watching the apartment for about a month while Ms. Santiago was in Virginia and that he did not know whether (*a fortiori*, when) the dog was walked by Reyes during that time.

Discussion

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065

[* 6]

(1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In the seminal case of Strunk v. Zoltanski (62 NY2d 572 [1984]) the Court of Appeals held that a landlord who leases a premises with knowledge that a tenant has a vicious dog which will be kept on the premises, without taking reasonable measures to protect persons who might otherwise be on the premises, may be liable to a person who is subsequently attacked by the dog. Contrariwise, the Court of Appeals also stated that a landlord is not liable for attacks by animals where it had no knowledge of the animal or its dangerous proclivities at the time of the initial letting of the premises.

The Appellate Division of this department has held that it is not sufficient notice for the landlord to know that a pit bull was harbored in an apartment, but there must also be knowledge that a particular dog had vicious propensities for liability to attach. Moreover, it is not sufficient to infer vicious propensities from the particular breed involved. Rivers v. New York City Housing Authority, 264 AD2d 342 (1st dept. 1999); Carter v. Metro-North Associates, 255 AD2d 251 (1st dept. 1998).

At bar, NYCHA has *prima facie* established that it did not know about the dog at all and, consequently, could not have known about any vicious propensities. The dog was not registered by its owner and there is no record of any complaint or prior incident regarding the dog in the tenant's file. NYCHA employees, who worked at the building, denied ever seeing the dog.

In opposition to the motion, plaintiff failed to come up with any admissible evidence to create an issue of fact regarding NYCHA's knowledge. There is no

statement whatsoever that the dog was regularly seen at the building by others. Notwithstanding plaintiff's argument, that the dog must have been regularly walked and seen by NYCHA employees, she has failed to come forward with any statement by anyone with personal knowledge that the ownership of the dog was open and notorious at the building. Mr. Colon denies any knowledge about whether Ms. Reyes walked the dog for the month she was staying in the apartment.

Plaintiff's reliance on Mr. Colon's testimony does not otherwise create any issue of fact on the issue of knowledge. While he testified to a prior biting incident with the dog in 2003 at another NYCHA building in the Bronx, there is simply no evidence that NYCHA was ever notified about this incident or that it otherwise should have known about the incident.

Conclusion

The absence of knowledge precludes liability in this case. The motion for summary judgment dismissing the case is, therefore, granted. As a consequence of the dismissal of the case in chief, the third party actions are also dismissed as moot.

Accordingly it is hereby:

ORDERED that defendant motion for summary judgment dismissing the complaint is granted, and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment in favor of defendant and against plaintiff dismissing the complaint with prejudice, and it is further

ORDERED that the Clerk of the Court is directed to enter a judgment dismissing the third party actions, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied, and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: New York, New York
November 30, 2010

SO ORDERED:



J.G. J.S.C.

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