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| Bencivenga v Condon |
| 2011 NY Slip Op 33192(U) |
| November 28, 2011 |
| Sup Ct, Suffolk County |
| Docket Number: 12615/2009 |
| Judge: William B. Rebolini |
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Tara Bencivenga,

Plaintiff,

-against-

Edward M. Condon, Marybeth B. Condon,
Gary C. Comparetto, Gregory W. Comparetto
and Landview Partners, LLC

Defendants.

Clerk of the Court

Index No.: 12615/2009Motion Sequence No.: 003; MOT.DMotion Date: 7/5/11Submitted: 8/23/11Motion Sequence No.: 004; XMDMotion Date: 8/23/11Submitted: 8/23/11Attorney for Plaintiff:

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Upon the following papers numbered 1 to 28 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 17; Notice of Cross Motion and supporting papers, 18 - 22; Answering Affidavits and supporting papers, 23 - 24; Replying Affidavits and supporting papers, 25 - 28.

In this action, the plaintiff seeks to recover damages for personal injuries sustained when, on July 16, 2008, she was bitten by a dog owned by defendant Gary C. Comparetto. The subject dog resides with Gary in premises owned by his parents, defendants Edward M. Condon and Marybeth B. Condon. Gary's brother, defendant Gregory C. Comparetto resides in the basement of the premises. On the date of the incident, Gregory was caring for the dog for his brother because his brother was on vacation. The dog purportedly bit the plaintiff on the nose while she was at the premises visiting Gregory. In her complaint, the plaintiff alleges that the defendants are liable for her injuries based on their ownership, maintenance and control of the premises and the subject dog. She seeks recovery based on common negligence and strict liability. She alleges that she is entitled to such recovery because the defendants were on notice of the dogs vicious propensities. In her bill of particulars the plaintiff alleges, among other things, that Gary advised her that the animal had bitten three people prior to the subject occurrence. This action was discontinued as against defendant Landview Partners, LLC.

The remaining defendants move for summary judgment dismissing the complaint on the grounds that (1) New York does not recognize a common law negligence cause of action to recover damages for injuries caused by a domestic animal, and (2) the dog did not have vicious propensities of which they were, or should have been, on notice. The plaintiff opposes the motion and cross-moves for summary judgement on the issue of the defendants' liability for her injuries.

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 demonstrate the absence of any material issues of fact (*see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see, Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of their motion for summary judgment, the defendants submit, *inter alia*, the plaintiff's deposition testimony, the deposition testimony of Gary Comparetto, the deposition testimony of Gregory Comparetto, the deposition testimony of Edward Condon, the deposition of Marybeth Condon, the affidavit of Gary Comparetto and the affidavit of Mike Casale. As is relevant to this motion, the plaintiff testified that she had met the subject dog on three occasions prior to the subject incident. On those occasions, she had petted the dog and did not observe the dog exhibit any

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aggressive behavior. She was not aware, on those prior occasions, that the dog had ever bitten. The plaintiff never saw a beware of dog sign at the premises and never saw the subject dog bare its teeth. On the date of the incident, she arrived at the premises after picking up Chinese food with Gregory. After returning, the dog, which was crated when there was no one home, was freed. The plaintiff testified that after the dog was let out of the crate she was kneeling on the floor and eye level with the dog. The dog suddenly leaped at her and attacked her, biting her nose twice. Gregory grabbed the dog and hit him. Gregory then brought her to the hospital where she received stitches and plastic surgery. The plaintiff testified that a few days after the accident, Gary called her to apologize. At that time he told her that the subject dog had bitten a couple of times prior. The plaintiff thereafter spoke to a mutual friend of her and Gary, Mike Casale. Casale told her that the dog had bitten before and whom the dog had bitten.

Gary Comparetto testified essentially as follows. He is the sole owner of the subject dog, but was on vacation at the time of the incident. According to Gary, the subject dog showed no prior instances of bad behavior. The dog never growled, snarled, showed its teeth, snapped, lunged or charged. The dog was never muzzled prior to the incident. The dog was not crated when someone was home and had free rein of the premises. The dog would go out in the fenced in yard to use the bathroom. There were no beware of dog signs on the premises. Gary admitted that the dog would growl if someone came to the door and would growl and bark if someone pulled up in a car, but testified that when they came up to the door the dog was always friendly. He stated that sometimes when people came into the premises the dog would jump on them to say hello. According to Gary, no one ever complained to him about the dog prior to the incident. Gary admitted speaking to the plaintiff following the incident on the telephone. According to Gary, he told her that the dog was not aggressive and that she must have startled him. The plaintiff agreed with him that the dog was not aggressive and was a "good dog." In his affidavit, Gary expressly avows that he never told the plaintiff that the dog had bitten on a prior occasion because the dog had not bitten on a prior occasion.

Gregory Comparetto, Edward Condon and Marybeth Condon all testified that they had no knowledge of the dog ever displaying vicious behavior such as biting, snarling, growling, barking, showing his teeth or jumping. Gregory admitted that the dog was kept in the cage when they were out but testified that this was to keep the dog from going to the bathroom in the house. Edward Condon admitted that he had observed the dog sleeping in a cage and, on occasion, saw the dog chained in the backyard. Marybeth Condon testified that she never saw the subject dog restrained, but did occasionally see him in a cage or chained to a corkscrew in the backyard.

In his affidavit, Mike Casale avers that he does not know the subject dog or the subject dog's history and has no information with respect to whether the dog had ever bitten anyone in the past. Casale states that he is unsure why the plaintiff testified that he told her about the dog's history because he had not.

The evidence submitted establishes the defendants' entitlement to judgment, as a matter of law, dismissing the plaintiff's cause of action sounding in common law negligence. It is now settled

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that when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in Collier v. Zambito (1 NY3d 444 [2004]), i.e., the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities (see, Petrone v. Fernandez, 12 NY3d 546 [2009]; Bard v. Jahnke, 6 NY3d 592, 599 [2006]; see, Bernstein v. Penny Whistle Toys, Inc., 10 NY3d 787 [2008]; Wright v. Fiore, 77 AD3d 821 [2nd Dept., 2010]). Thus, the plaintiff's first cause of action cannot stand (see, Petrone v. Fernandez, 12 NY3d 546 [2009]; Curbelo v. Walker, 81 AD3d 772 [2nd Dept., 2011]).

The evidence submitted fails to establish that the defendants are entitled to summary judgment dismissing the cause of action for strict liability. "To recover in strict liability in tort for damages caused by a dog bite, a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities" (Ortiz v. Contreras, 53 AD3d 603, 548 [2nd Dept., 2008]; see, Collier v. Zambito, 1 NY3d 444 [2004]; Jacobsen v. Schwarz, 50 AD3d 964 [2nd Dept., 2008]; Marek v. Burmester, 37 AD3d 668 [2nd Dept., 2007]). Evidence tending to demonstrate a dog's vicious propensities includes that of a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm (see, Bard v. Jahnke, 6 NY3d 592, 599 [2006]; Collier v. Zambito, 1 NY3d 444 [2004]; Dykeman v. Heht, 52 AD3d 767 [2nd Dept., 2008]; Grubb v. Healy, 52 AD3d 472 [2nd Dept., 2008]; Galgano v. Town of N. Hempstead, 41 AD3d 536 [2nd Dept., 2007]). In this regard, the Court finds that the plaintiff's testimony that Gary admitted to her that the subject dog had bitten on prior occasions raises a triable issue of fact as to whether the subject dog had vicious propensities of which the defendants were, or should have been, on notice (see, Parente v. Chavez, 17 AD3d 648 [2nd Dept., 2005]; see, generally, Kamolov v. BIA Group, LLC, 79 AD3d 1101 [2nd Dept., 2010]; Signorelli v. Great Atl. & Pac. Tea Co., Inc., 70 AD3d 439 [1st Dept., 2010]). Accordingly, the branch of the defendants' motion which seeks summary judgment dismissing the plaintiff's cause of action sounding in strict liability is denied.

The plaintiff's cross motion for summary judgment on the issue of liability is also denied. In support of her cross-motion the plaintiff submits, *inter alia*, her own affidavit and photographs purportedly depicting the gravity of her injury. In her affidavit, the plaintiff states that notwithstanding Casale's affidavit, he had, in fact, told her the subject dog had bitten on three prior occasions. The plaintiff also reiterates Gary's purported admission to her, following the incident, that the subject dog had previously bitten on three occasions. According to the plaintiff, Gary told her the dog bit two friends and a service repairman. The plaintiff also relies on the deposition testimonies submitted by the defendants in support of the motion. This evidence was insufficient to establish as a matter of law that the subject dog had vicious propensities of which, the defendants were, or should have been, on notice.

So ordered.


Accordingly, it is

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ORDERED that the motion by the defendants is granted to the extent that it seeks summary judgment dismissing the plaintiff's cause of action to recover damages for common law negligence, and is otherwise denied; and it is further,

ORDERED that the cross motion by the plaintiff for partial summary judgment on the issue of liability is denied.

Dated: 11/28/2011


HON. WILLIAM B. REBOLINI, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION