SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS A. ADAMS,
Supreme Court Justice

TRIAL/IAS, PART 25
NASSAU COUNTY

MATTHEW HENRIQUES, an infant by his Mother and Natural Guardian, CARINA R. HENRIQUES and CARINA R. HENRIQUES,

Plaintiff(s),

-against-

MOTION DATE:6/8/12
INDEX NO.: 9575/08
SEQ. NOs. 9-13

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, LAWRENCE E. KELLY JR a/k/a LARRY KELLY, JEZEL YEPEZ a/k/a ANTHONY YEPEZ, CHRISTOPHER SCHECK, DIONISIOS GEORGATOS, JOHN/JANE DOE #1, JOHN/JANE DOE #2, JOHN/JANE DOE #3, LAWRENCE ETKIND and IRENE ETKIND,

Defendant(s)

The defendants Christopher Scheck, Dionisios Georgatos, Town of Hempstead and Lawrence Etkind's respective motions, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' complaint as against them and the plaintiffs' cross motion, pursuant to 22 NYCRR §202.42(a), for a unified trial are determined as hereinafter provided.

The defendants Lawrence E. Kelly, Jr., Jezel Yepez, Christopher Scheck and Dionisios Georgatos were college friends who rented a residence located at 712 Buchanan Road in East Meadow from the defendant Lawrence Etkind between August 15, 2005 and August 16, 2006 (see plaintiffs' Exhibit A). The lease (p.4) explicitly prohibited pets. Nevertheless, the defendant Kelly admittedly brought with him a rottweiler, "Jasmine", which he owned and harbored at his prior residence in Levittown. Moreover, on January 29, 2004 the animal had earlier been adjudicated a "dangerous dog" (Anzalone, J.) (see plaintiffs' Exhibit B). After relocating to East Meadow, Mr. Kelly also purchased two additional dogs, another rottweiler, "Bishop", and a bull dog, "Duke". On April 28, 2006 at approximately 2:00 p.m. the infant plaintiff, Matthew Henriques, age four, and his fourteen month old sister accompanied their grandparents on a walk near the aforementioned premises. At or near an adjacent residence (756 Barkley Avenue) (see defendant Etkind's Exhibit D, plaintiffs' 5/4/09 bill of particulars, para.2) Matthew was attacked and repeatedly

bitten by all three dogs who had escaped from their backyard.

The plaintiffs subsequently filed this personal injury action. Their July 10, 2006 supplemental summons and amended verified complaint (see defendant Etkind's Exhibit B) asserts causes of action for, inter alia, strict liability and negligence. Following joinder of issue and the completion of disclosure, the case was certified for trial on May 11, 2011 and on August 4, 2011 a note of issue was filed.

"To recover in strict liability in tort for [damages caused by] a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog, or the person in control of where the dog was [kept], knew or should have known of such propensities" (Jones v Pennsylvania Meat Market, 78 AD3d 658,659 quoting Clapps v Animal Haven, Inc., 34 AD3d 715,716; see Vavaro v Belcher, 65 AD3d 1225; 1B NY PJI3d 2:220).

Generally, landlords do not owe a duty of care to persons injured by a tenant's dog where the injury occurs off the landlord's premises (see Champ-Doran v Lewis, 69 AD3d 1101,1102). "To recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had actual notice that a dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities; and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog" (McKnight v ATA Housing Corp., 94 AD3d 957 quoting Sarano v Kelly, 78 AD3d 1157). Although the defendant Etkind's February 28, 2012 cross motion was made more than 90 days after the plaintiffs' August 4, 2011 filing of a note of issue and is therefore untimely (see CPLR 3212[a]), it may be considered because it relies upon nearly identical grounds as the defendants Scheck and Georgatos' timely motions (see Grande v Peteroy, 39 AD3d 590,591-592). Yet, contrary to his contention, the landlord - who, notably, was not deposed due to an alleged incapacity and whose son, Lawrence E. Etkind, has been appointed Guardian Ad Litem (see defendant Etkind's Exhibit A) - has not established a prima facie entitlement to summary judgment (cf. McKnight, Sarno supra). That branch of the defendant Etkind's motion, pursuant to CPLR 3212, seeking summary judgment dismissing the plaintiffs' strict liability claim as against him is therefore denied. Conversely, the plaintiffs' negligence cause of action is dismissed. "[T]here is no such thing as negligence liability where harm done by domestic

animals is concerned" (Petrone v Fernandez, 12 NY3d 550 quoting Bard v Jahnke, 6 NY3d 592).

"A person who harbors or keeps a dog with knowledge of the dog's vicious propensities is liable for injuries caused by the dog" (Dafour v Brown, 66 AD3d 1217,1218). Here, the defendant Kelly's admission that "they were [his] dogs" (see defendant Etkind's Exhibit E, p.42,L14) and that he was responsible for "letting them out" (p.42,L15) and feeding them is sufficient to establish the defendants Scheck and Georgatos' respective entitlement to judgment as a matter of law on the grounds that they did not harbor the animals. The mere fact that Mr. Scheck and/or Mr. Georgatos occasionally cared for (e.g., feed) them as a favor for their friend when he was unavailable (p.42,L18) is insufficient to create a triable issue of fact as to whether they harbored the animals. Conversely, Mr. Etkind, as the landlord, was authorized to remove the dogs which Mr. Kelly harbored in violation of the lease (see Champ-Doran supra at 1102; Dafour supra at 1218; Zwinge v Love, 37 AD 874). The defendants Scheck and Georgatos' respective motions, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' action as against them are therefore granted.

The defendant Town of Hempstead's January 13, 2012 cross motion, pursuant to CPLR 3212, for summary judgment dismissing the plaintiffs' complaint as against it is also untimely and no "good cause" has been demonstrated for the delay (see CPLR 3212[a]). However, unlike Mr. Etkind's cross motion, it is premised upon an entirely different ground (i.e., the alleged absence of a special duty to the plaintiffs) than the co-defendants' timely motions. It is therefore dismissed (see Miceli v State Farm, 3 NY3d 725; Brill v City of New York, 2 NY3d 648).

Finally, the plaintiff's cross motion, pursuant to 22 NYCRR §202.42(a), for a unified trial is denied.

Dated: SEP 12 2012

J.S.C.