| **Colombini v Benitez** |
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| 2016 NY Slip Op 31829(U) |
| September 30, 2016 |
| Supreme Court, New York County |
| Docket Number: 159133/2012 |
| Judge: David B. Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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ERICA COLOMBINI,

Plaintiff,

-against-

MIJAIL BENITEZ, 118 WEST CORPORATION, MICHELLE COLELLO, MARK SALTZ, SAM SALTZ

Defendants.

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**DECISION/ORDER**
**Index No. 159133/2012**

**Motion Seq #1 and #2**

Recitation, as required by CPLR §2219(a), of the papers considered in reviewing the underlying motion:

| Papers for Motion Seq 1 | Number |
|---|---|
| Notice of Motion for Summary Judgment by Defendant Colello and affidavits/exhibits annexed | 1 |
| Notice of Cross-Motion for Summary Judgment by Defendant S. Saltz and affidavits/exhibits annexed | 2 |
| Opposition to Colello motion by Defendant Benitez and affidavits/exhibits annexed | 3 |
| Notice of Cross-Motion for Summary Judgment by Defendant Benitez and affidavits/exhibits annexed | 4 |
| Notice of Cross-Motion for Summary Judgment by Plaintiff and affidavits/exhibits annexed | 5 |
| Plaintiff's Opposition to Defendant Colello's motion | 6 |
| Plaintiff's Opposition to Defendant S. Saltz's motion | 7 |
| Plaintiff's Opposition to Defendant Benitez's motion | 8 |
| Reply and Opposition by S. Saltz | 9 |
| Reply and Opposition by Colello | 10 |
| Reply by Plaintiff to S. Saltz | 11 |
| Reply by Plaintiff to Colello | 12 |

| Papers for Motion Seq 2 | Number |
|---|---|
| Notice of Motion for Summary Judgment by Defendant 118 West Co. and affidavits/exhibits annexed | 1 |
| Notice of Cross-Motion for Summary Judgment by Defendant M. Saltz and affidavits/exhibits annexed | 2 |
| Notice of Cross-Motion for Summary Judgment by Plaintiff and affidavits/exhibits annexed | 3 |
| Opposition by Defendant M. Saltz to Plaintiff's Cross-motion | 4 |
| Plaintiff's Reply | 5 |

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In 1993, defendant Mark Saltz "(M. Saltz") was the prime tenant of apartment 8R located at 118 West 27th Street, New York, New York (the "Apartment"). The Apartment was owned and leased by defendant 118 West Corporation ("118 West"). The lease agreement between M. Saltz and 118 West did not

contain any pet policy. In 2002, M. Saltz moved out of the Apartment so that his son, defendant Sam Saltz ("S. Saltz"), could move in. Although, S. Saltz began paying rent directly to 118 West, M. Saltz remained the prime tenant according to the lease agreement.

In 2006, S. Saltz adopted a pit bull, mixed breed dog from an animal shelter. After the adoption, M. Saltz was aware that the dog resided in his apartment and, in fact, occasionally came to the Apartment to walk and feed it. Both M. Saltz and S. Saltz maintain that the dog was generally mild tempered and they never saw the dog bite, snap, bark, growl, lunge or bare his teeth at anyone.

In early 2008, S. Saltz was offered a job to teach English to children in Korea beginning in March of 2009. In the Fall of 2008, defendant Mijail Benitez ("Benitez") moved into the Apartment as S. Saltz' roommate. After a few months, Benitez and S. Salts reached agreement that Benitez would stay in the Apartment while S. Saltz was in Korea. The agreement included an explicit understanding that Benitez would care for the dog and the Apartment while S. Saltz was in Korea.

In March 2009, S. Saltz went to live temporarily in Korea. At that time, Benitez lived in the Apartment alone while attending classes as a student at The New School. M. Saltz continued to stop by the Apartment to check in on the Apartment and the dog. During this time period, M. Saltz would take care of the dog and would walk and feed it. Benitez maintained that the dog was not vicious and never bit, snapped, barked, growled, lunged or bared his teeth at anyone.

On August 28, 2009, unbeknownst to M. Saltz or S. Saltz, defendant Colello signed a written agreement to sublease from defendant Benitez. Colello then moved into the Apartment and lived with Benitez for approximately three months. Although Colello denies involvement with the dog, while living there, Colello took affectionate pictures with the dog, including hugging and kissing it. These pictures were posted to Facebook, along with other photos of defendant Colello's friends exhibiting similar affectionate behavior with the dog. Colello also maintained that the dog never bit, snapped, barked, growled, lunged or bared his teeth at anyone.

In late November/early December 2009, Benitez went to his parents' home in Mexico leaving Colello as the sole occupant of the Apartment. Benitez left his belongings in the Apartment. In the past,

Benitez occasionally traveled to his parents' home and remained there for periods of time. It is undisputed though that from the time that Colello moved in, through Benitez's travels and December 28, 2009, Colello lived as a co-tenant in the apartment with the dog and, in fact, lived with the dog alone for a month.

Sometime in between Benitez travelling to Mexico and December 28, 2009, M. Saltz went to the Apartment and found defendant Colello sleeping. Colello informed M. Saltz that Benitez had left for Mexico. At that time, M. Saltz did not ask Colello to leave the Apartment. M. Saltz contends that this meeting occurred at the end of November and Colello stated that it occurred in the latter part of December.

M. Saltz maintains that Colello contacted him on December 28, 2009, concerning care of the dog. In the same conversation, M. Saltz maintains that Colello told him that Benitez was supposed to have arranged for someone to care for the dog, but no one had come to the apartment to care for the dog since Bentiez's departure. This alleged conversation is also where Colello informed M. Saltz that she was subletting the Apartment from Benitez. Colello denies having this conversation. However, in an email correspondence between Colello and S. Saltz dated December 29, 2009, Colello confirms that she spoke with M. Saltz regarding an agreement for Colello to remain in the Apartment. The terms of their agreement are unclear.

M. Saltz and S. Saltz interpreted Benitez's actions as an abandonment of his duties with respect to the apartment and the dog and discussed terminating Benitez's sub-tenancy in the Apartment. M. Saltz maintains that he offered Colello a rent-free tenancy in exchange for taking care of the dog. Colello allegedly expressed concern regarding her ability to adequately care for the dog. As a compromise, M. Saltz offered defendant Colello a "two-day trial period" in which Colello would be given the opportunity to try out the living arrangement to determine whether or not she could adequately care for the dog. Colello denies taking any responsibility for the dog, disputes the existence of a "two-day trial period" and didn't remember the December 29, 2009 correspondence.

On December 29, 2009, Colello's high school friend, Erica Colombini ("plaintiff"), visited the Apartment. After about an hour, plaintiff and Colello left and went to a bar named "The Black Door,"

where they consumed alcoholic beverages. At around 11:00 PM, plaintiff and Colello walked back to the Apartment. Upon entering the Apartment, Colello went to sleep in her bed.

At around 12:30 AM on December 30, 2009, plaintiff took a dog treat from the kitchen counter, broke it in half and gave one half to the dog. Plaintiff accidentally dropped the other half of the treat right next to the dog and squatted down to pick it up. At this exact moment, the dog lunged and bit plaintiff, breaking the skin on the right side of her face between her nose and her upper lip. Plaintiff screamed, waking up Colello who rushed to plaintiff, brought plaintiff to the bathroom and called 911. EMS arrived and brought plaintiff to Beth Israel hospital.

While at the hospital, nurses assisted plaintiff and Colello in the creation of an "Animal Bite Report," which documents the dog's actions, habits and demeanor. During this time, plaintiff maintains that Colello told the nurses and plaintiff's mother about two other bite incidents involving this dog. Plaintiff's mother submits an affidavit in furtherance of plaintiff's contention. Colello denies saying or having any knowledge about any prior bite incidents. No prior Animal Bite Reports exist for the dog in question. As a result of the bite, plaintiff received 16 external and 3 internal stitches on her face.

## PROCEDURAL HISTORY

On May 23, 2011, as a result of her injuries from the dog bite, plaintiff brought an action for personal injury against defendants Colello, M. Saltz and S. Saltz. Plaintiff brought a second action against defendants Benitez and 118 West on December 21, 2012. The two actions were consolidated by Justice Mills on June 26, 2013. Additionally, Colello, Benitez, M. Saltz and S. Saltz all seek contribution from one another should liability be granted pursuant to Article 16 of the CPLR. Before the Court now are motions and cross-motions for summary judgment made by all parties.

## LEGAL ANALYSIS

Summary judgment is a drastic remedy that should not be granted where a triable issue of fact exists (*Integrated Logistics Consultants v Fidelia Corp.*, 131 AD2d 338 [1st Dept 1937]; *Rainer v Elovitz*, 198 AD2d 184 [1st Dept 1993]). On a summary judgment motion, the court must view all evidence in a light most favorable to the non-moving party (*Rodriguez v Parkchester South Condominium Inc.*, 178 AD2d 231

[1st Dept 1991]). The moving party must show that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 324 [1986]). 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. Cir.*, 64 NY2d 851 [1985]). After the moving party has demonstrated its prima facie entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In order 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 about said dog's vicious propensities (*see Petrone v Fernandez*, 12 NY3d 546 [2009]; *Bard v Jahnke*, 6 NY3d 592 [2006]; *Collier v Zambito*, 1 NY3d 444 [2004]). Moreover, the knowledge of someone to whom the care and custody of a dog is entrusted is imputed to the dog's owner (*Laguttuta v Chisolm*, 65 AD 326 [1st Dept 1901]; *see also Brice v Bauer*, 108 NY 428 [1888]; *Ruffin v Wood*, 31 Misc 3d 1244(A) [Sup Ct 2011], affd, 95 AD3d 1290 [2d Dept 2012]).

Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl or 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 (*Ioveno v Schwartz*, 139 AD3d 1012 [2nd Dept 2016], *citing Bard*, 6 NY3d at 597; *Collier v Zambito*, 1 NY3d 444 [2004]).

However, vicious propensities "cannot consist of behavior that is normal or typical for the particular animal in question" (*Bloomer v Shauger*, 21 NY3d 917, 918 [2013]). Therefore, behavior like nervousness or aggressiveness towards other dogs does not necessarily imply viciousness (*see Bard*, 6 NY3d at 596 [2006]). Additionally, "the particular type or breed of domestic animal alone is insufficient to raise a question of fact as to vicious propensities (*Bard,* 6 NY3d at 596 [2006]).

Liability also extends to those who harbor or keep the animal with knowledge of its propensity (*Quilty v Battie*, 135 NY 201 [1892]; *see also Arbegast v Board of Education*, 65 NY2d 161, 164 [1985] ["[T]he rule governing one who keeps an animal with knowledge of its vicious propensities is one of strict liability or, as it is sometimes called, absolute liability, rather than negligence"]; *Molloy v Starin*, 191 NY 21 [1908]; *Belyski by Belyski v Pedone*, 240 AD2d 608 [2nd Dept 1997]; *Dufour v Brown*, 66 AD3d 1217 [3rd Dept 2009]; *Zwinge v Love*, 37 AD2d 874 [3rd Dept 1971]). While the term "harboring" lacks a singular definition, the Court has noted the term's implicit connection to property. In *Quilty v Battie*, the Court noted that the defendant "kept and harbored [the dog] upon her own premises" and that she "assented to the maintenance of the dog upon her premises" (*Quilty,* 135 NY at 207). In *Dufour v Brown*, the Court notes that the dog "lived with [non-owner] Cleveland, with her permission in the home that she owned" (*Dufour,* 66 AD3d at 1218). Similarly, in *Matthew H. v County of Nassau*, the Court held two co-tenants strictly liable for an attack by dogs owned exclusively by a third co-tenant (*Matthew H.,* 131 AD3d at 145). The Court noted that liability can extend to other co-tenants when evidence indicates that those co-tenants participated in the care of the dogs in their household to a sufficient degree to support a finding that they joined with the dog's owner in harboring the animal (*id.*)

However, simply owning the premises on which the dog resides is not enough to impose liability. Harboring also involves some level of control or dominion. In *Zwinge v Love* (37 AD2d 874 [3rd Dept 1971]), the Court declined to impose liability on the defendant parents of the owner of the dog who did not reside on the premises, but nonetheless owned the premises. In *Zwinge*, the Court found "no evidentiary showing indicating that defendant [owner but non-resident of the premises] harbored or kept [the dog]," (*id.; see Nidzyn v Stevens*, 148 AD2d 592 [2nd Dept 1989]; *see also Rodriguez v Messenger*, 108 AD2d 1085, 1086 [3rd Dept 1985]).

Similar to the doctrine extending liability to "harborers" of vicious dogs, in order for landlords to be held liable for injuries sustained as a result of an attack by a tenant's dog, "it must be demonstrated that the animal had vicious propensities and that the landlord knew or should have known of these propensities" (*Rivers v NY City Hous. Auth.*, 264 AD2d 342 [1st Dept 1999] citing *Carter v Metro N. Assocs.*, 255 AD2d

251 [1st Dept 1998]). Moreover, the Second Department added that, in order to impose liability, the plaintiff would have to show that the landlord "had sufficient control of the premises to allow the landlord to remove or confine the dog" (*Velez v Andrejka*, 126 AD3d 685, 686 [2nd Dept 2015] *citing Sarno v Kelly*, 78 AD3d 1157, 1157 [2nd Dept 2010]; *see also Strunk v Zoltanski*, 62 NY2d 572, 575 [1984]).

**118 West Corporation**

Defendant 118 West Corporation was clearly the owner and lessor of the Apartment. However, 118 West does not own or control the dog. 118 West was also not aware of any animal living in the apartment. Further, defendant 118 West asserts that there was no evidence from which it could have learned of the alleged vicious propensities of the dog. Finally, defendant 118 West contends it did not have sufficient control over the apartment to remove or confine the dog.

Additionally, neither plaintiff, nor any of the co-defendants have opposed 118 West's motion for summary judgment. Accordingly, 118 West's motion for summary judgment is granted.

**Sam Saltz**

Defendant S. Saltz is the owner of the dog and thereby satisfies the first requirement imposing liability. Although, S. Saltz denies having any knowledge of any vicious propensity of the dog and maintained that the dog never bit, snapped, barked, growled, lunged or bared his teeth at anyone, a triable issue of fact still remains regarding S. Saltz's liability. During his deposition, S. Saltz also discussed another incident that he was told took place while away and was allegedly related to him by Benitez or M. Saltz. However, S. Saltz was not able to provide any details as to this incident, there was no police or animal bite reports filed and both Benitez, nor M. Saltz denied any such incident. As a result, whether the dog had vicious propensities and if so, S. Saltz's knowledge thereof remain a genuine issue of material fact in dispute and S. Saltz's motion for summary judgment must be denied.

**Mark Saltz**

Defendant M. Saltz was the tenant of record of the Apartment at the time of the attack. Additionally, he frequently visited the Apartment and cared for the dog by feeding it and walking it on multiple occasions. M. Saltz continued to take care of the dog in his son's absence while the dog was supposed to be

taken care of by Benitez. He was the one who arranged the trial-period and was the person to whom Colello would be reporting the results of the trial period. Throughout the relevant time period he participated in the care of the dog or decision making regarding the dog and assented to the maintenance of the dog upon the premises for which he was the tenant. As a result, M. Saltz must be considered a "harborer" of the dog.

However, there is a triable issue of fact with regard to M. Saltz's knowledge of the dog's vicious propensities. M. Saltz was in regular communication with his son, S. Saltz about the Apartment while S. Saltz was away. S. Saltz stated that M. Saltz was aware of an alleged prior incident and S. Saltz requested that M. Saltz investigate further. For these reasons, there still remains the question of whether this dog had vicious propensities and whether M. Saltz's knew of the alleged vicious propensities. Since there remain triable issues of fact that must be decided by a jury, M. Saltz's motion for summary judgment must be denied.

**Mijail Benitez**

Defendant Benitez was not in the apartment at the time of the dog bite and in fact was not even in New York. However, it remains a question whether or not he remained a co-tenant and a "harborer" at the time of the attack. Benitez was the sole sub-tenant in the Apartment for six months prior to the incident and explicitly accepted responsibility for the dog. In fact, his entire agreement with S. Saltz was premised on this assumption of care and responsibility and he never told S. Saltz or M. Saltz that he had arranged other care. Even though Benitez did not physically live in the apartment for the month of December, it is not clear whether he had abandoned his tenancy in the Apartment. Benitez kept clothes and other belongings there, and prior testimony confirms that defendant Benitez had often vacationed to Mexico for extended periods, eventually returning to New York. In her deposition, Colello stated that she believed that Benitez was returning and Benitez never stated in his deposition that he had told any of the co-defendant that he was leaving. Thus, a question of fact remains whether Benitez could be deemed a harborer under these circumstances.

Additionally, the same facts that raise a question of the Saltz defendants' knowledge of vicious propensities apply to defendant Benitez. Whether or not there was an attack on a friend of defendant

Benitez, that Benitez knew about, also remains an issue of fact to be determined at trial. For the above reasons, and as there still remains the question of whether this dog had vicious propensities, Benitez's motion for summary judgment must be denied.

**Michelle Colello**

Defendant Colello undoubtedly did not own the dog and she denies all involvement with the dog. However, several photos and testimony plainly contradict these assertions. Colello was the only person living in the Apartment with the dog for a month, photos of her engaging and interacting with the dog indicates that that she could have controlled or harbored the dog. Moreover, defendant Colello signed a sublease agreement with defendant Benitez, making her a co-tenant of the Apartment. Further, in his deposition, defendant Benitez states that he asked defendant Colello to take care of the dog while he was away. Similarly, M. Saltz and plaintiff both confirm that defendant Colello was caring for the dog at the time of the incident.

However, a triable issue of fact exists regarding defendant Colello's knowledge of the dog's vicious propensities. Plaintiff alleges that, while at the hospital, defendant Colello told plaintiff's mother and the nurses about two prior bite incidents. Defendant Colello denies saying anything about any prior incidents and the nurse reports fail to mention anything about prior bites. Because, Colello cannot establish that she did not harbor the dog and there remains an issue of fact whether this dog had vicious propensities that she knew about, Colello's motion summary judgment must also be denied.

**Erica Colombini**

Plaintiff has established that M. Saltz was the tenant of the Apartment and was involved in the care of the dog. While Colello contests the existence of a two-day trial period and other contact with M. Saltz, it is undisputed that for nearly a month prior to the alleged assumption of a trial period, Colello lived alone in the Apartment with the dog and signed a sublease agreement, making her a co-tenant of the Apartment. Thus, both M. Saltz and Colello are harborers of the dog, and plaintiff is granted is summary judgment on this issue. Similarly, plaintiff is granted summary judgment on the fact that S. Saltz is the owner of the dog. However, plaintiff has not established (1) that the dog had vicious propensities, and (2) which defendants, if

any, had prior knowledge of the dog's alleged vicious propensity. Thus, the remainder of plaintiff's motion is denied.

Finally, because there remain questions as to which defendant had knowledge of any alleged prior incidents and which defendant actually had the ultimate responsibility over the dog vis-à-vis each other, there remain genuine issues of material facts in dispute regarding the cross-claims for contribution.

Accordingly, it is hereby

ORDERED that West 118 motion for summary judgment is granted and the complaint against West 118 is dismissed; and it is further

ORDERED that the motions for summary judgment by S. Saltz. M. Saltz, Benitez and Colello are denied; and it is further

ORDERED that plaintiff's motion for summary is granted to the extent of finding that plaintiff has established that M. Saltz and Colello are each a harborer of the dog; and it is further

ORDERED that plaintiff's motion for summary is granted to the extent of finding that plaintiff has established that S. Saltz is the owner of the dog; and it is further

ORDERED that plaintiff's motion for summary judgment is denied in all other respects.

This constitutes the decision and order of the Court.

**DATE :** 9/30/2016

**COHEN, DAVID B., JSC**