

**Leak v Skelton**

2016 NY Slip Op 32152(U)

October 24, 2016

Supreme Court, Kings County

Docket Number: 502497/13

Judge: Larry D. Martin

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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 24<sup>th</sup> day of October, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

RONDAYA LEAK,

PLAINTIFF,

-VS-

Motion Sequence # 4

INDEX No. 502497/13

ALFREDO SKELTON,

DEFENDANT.

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed _____	1-2 _____
Answering Affidavit (Affirmation) _____	3 _____
Reply Affidavit (Affirmation) _____	4 _____

Upon the foregoing papers, defendant Alfredo Skelton (“defendant”) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint herein.

Plaintiff Rondaya Leak (“plaintiff”), a seasonal UPS package delivery worker, commenced the instant action seeking compensatory damages for personal injuries she allegedly sustained on December 12, 2011, when she was bitten on her left thigh by a dog on the front steps of defendant’s home. The subject dog is a pit bull named Captain.

“To recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and the owner of the dog, or a person in control of the premises where the dog was, knew or should have known of [the dog’s vicious] propensities” (*Velez v Andrejka*, 126 AD3d 685, 685-86 [2d Dept 2015]). “Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others” (*Bueno v Seecharan*, 136 AD3d 702, 702-03 [2d Dept 2016]). “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,

1012 [2d Dept 2016]; *Collier v Zambito*, 1 NY3d 444, 446-47 [2d Dept 2004]). “The nature and severity of the attack does not demonstrate knowledge of the dog’s alleged vicious propensities” (*see Sers ex rel. Sers v Manasia*, 280 AD2d 539, 540 [2d Dept 2001]).

As an initial matter, the court notes defendant’s claims that Captain belonged to his nephew, who had moved to a new residence where dogs were not allowed, and also that Captain’s stay at his home was meant to be “temporary” as of November, 2011 (Deposition of defendant, 14: 14-19; 15: 10-13; 21: 15). Despite defendant’s denial of ownership of Captain, the court finds that he *may* be held liable under the theory of strict liability as the person in control of the premises where Captain was residing at the time of the subject incident (*see generally Velez*, 126 AD3d at 685-86).

Nevertheless, based upon a review of the record submitted by the parties and the relevant law, the Court finds that defendant met his initial prima facie burden of proof entitling him to judgment as a matter of law through the submission of a copy of his deposition transcript establishing that he was not aware, nor should he have been aware that Captain had ever bitten anyone or exhibited any aggressive behavior or vicious propensities (*see Ioveno*, 139 AD3d at 1012). At his deposition, defendant testified that shortly after Captain came to live at his home, he put a “Beware of the Dog” sign on a small pine tree in his yard that was visible from the outside of his gate (Deposition of defendant, 24: 23; 25: 6-25). Defendant explained that he put the sign up so that people would know that there was a dog in his backyard (Deposition of defendant, 26: 7-9). Defendant further testified that he allowed Captain to remain unleashed in his backyard during the daytime and that he would be indoors during the nighttime (Deposition of defendant, 22: 4-6; 23: 13). Defendant, who happens to be a police officer, denied that Captain had a negative reaction to individuals wearing a uniform (Deposition of defendant, 26: 15-17). Defendant also testified that while Captain sometimes barked at people, he never snarled at them (Deposition of defendant, 28: 20). Additionally, defendant denied receiving any complaints about Captain biting, growling or snarling at anyone (Deposition of defendant, 28: 25; 29: 6). Defendant testified that he was not aware of Captain biting anyone prior to the subject incident (Deposition of defendant, 29: 9). Defendant stated that whenever Captain

heard the doorbell, he would run to the front of the house and would sometimes bark at the person at the door but he denied that Captain would jump on the person at the door (Deposition of defendant, 29: 15-23, 30: 3). According to defendant, Captain never growled at or bit the pet chihuahua which was also residing at his home at the time of the incident (Deposition of defendant, 24: 2-19).

In opposition, plaintiff has failed to submit sufficient evidence in admissible form to raise a triable issue of fact regarding defendant's prior knowledge of the Captain's alleged vicious propensities. None of the issues asserted by plaintiff go to whether defendant had prior knowledge of Captain's alleged vicious propensities or to whether Captain had ever previously bitten anyone (*see Palumbo v Nikirk*, 59 AD3d 691, 692 [2d Dept 2009]). There is no evidence submitted that the mere presence of a "Beware of Dog" sign in defendant's yard was in response to any prior vicious acts or hostile tendencies by Captain (*see Vallejo v Ebert*, 120 AD3d 797, 798 [2d Dept 2014]; *Palumbo*, 59 AD3d at 692; *Sers*, 280 AD2d at 540; *compare Miller v Isacoff*, 39 AD3d 718, 718-19 [2d Dept 2007]; *compare Parente v Chavez*, 17 AD3d 648, 648-49 [2d Dept 2005]). Moreover, the fact that Captain had previously barked at people who rang the doorbell is insufficient to raise a triable issue of fact as to whether it had vicious propensities (*see Ioveno*, 139 AD3d at 1012-13). Additionally, there is no evidence submitted indicating that Captain was a guard dog for defendant (*compare Beljean v Maiuzzo*, 256 AD2d 533, 534 [2d Dept 1998]). Finally, plaintiff's claims about statements made to her by defendant's neighbor and a UPS co-worker regarding Captain's alleged vicious propensities constitute inadmissible hearsay (*see Roche v Bryant*, 81 AD3d 707, 708 [2d Dept 2011]) and, as such, are insufficient to raise a triable issue of fact regarding whether Captain actually exhibited any fierce or hostile tendencies prior to the subject incident.<sup>1</sup>

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<sup>1</sup>At her deposition, plaintiff testified that defendant's neighbor, who helped ward off and hold Captain at the time of the incident, told her that he had previously warned defendant to keep Captain on a leash because he was "vicious" (Deposition of plaintiff, 42: 14-18). Plaintiff also testified that a UPS co-worker told her that Captain had attacked him the week prior to the subject incident when he was delivering a package to defendant's home but that he was able to escape by running and jumping over defendant's fence (Deposition of plaintiff, 47: 4-23). Plaintiff was unable to provide the identity of either defendant's neighbor or the UPS co-worker.

Accordingly, defendant's motion for summary judgment dismissing the complaint herein is granted.

The foregoing constitutes the decision, order and judgment of the Court.

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Motion Seq. #

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ENTER,



HON. LARRY D. MARTIN  
J.S.C.