SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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NANCY A. TITUS and ERIC TITUS,

Plaintiffs,

- against -

BERNARD BOUCHARDY and JESSICA SOUTH,

Defendants.

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DECISION and ORDER

Index No. 51771/2016

McLOUGHLIN, EDWARD T., AJSC

The following papers were considered in connection with defendant Bouchardy's motion for summary judgment seeking to dismiss the complaint:

Defendant Bouchard's Motion/Affirmation /accompanying exhibits	31-39
Affirmation in Opposition /accompanying exhibits	43-52

Plaintiffs, Nancy A. Titus and Eric Titus, commenced this personal injury action on or about July 25, 2016 against defendants Bernard Bouchardy (hereinafter "Bouchardy") and Jessica South (hereinafter "South"), claiming that the plaintiff Nancy A. Titus (hereinafter "plaintiff") sustained serious injuries as a result of defendants' negligence on December 30, 2015. The incident occurred on the public right of way known as Starbarrack Road, Red Hook, New York, and the alleged negligence includes harboring dangerous dogs, harboring and keeping dogs with vicious propensities and in causing and/or permitting the dogs to attack the plaintiff while she was jogging in the street.

By decision and order dated March 22, 2017, the Hon. Cecilia G. Morris, United States Bankruptcy Judge, granted defendant South's bankruptcy application thereby discharging her from

this action. Remaining defendant Bouchardy now moves for summary judgment.

CPLR §3212(b) states in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law and directing judgment in favor of any party." §3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

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. Wingrad v. New York University Medical Center, 64 NY2d 851; Zuckerman v. City of New York, 49 NY2d 557. Once such a showing has been made, the burden of proof shifts such that an opponent of a motion for summary judgment must demonstrate the existence of a genuine triable issue of fact. Alvarez v. Prospect Hospital, 68 NY2d 320.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court that should only be employed when there is no doubt as the absence of triable issues. Castlepoint Insurance Company v. Command Security Corp., 144 AD3d 731 (2nd Dept. 2016). Issue finding, as opposed to issue determination, is the key to summary judgment. Gitlin v. Chirinkin, 98 AD3d 561 (2nd Dept. 2012). In deciding a motion, a Court must view the evidence in the light most favorable to the non-moving party. See Kutkiewicz v. Horton, 83 AD3d 904 (2nd Dept. 2011).

It is uncontested that the attack at issue herein occurred on a public roadway that was not owned by defendant Bouchardy. As the dog attack did not occur on defendant Bouchardy's property, Bouchardy is not liable to the plaintiff and summary judgment is appropriate. Braithwaite v. Presidential Property Services, Inc., 24 AD3d 487 (2nd Dept. 2005). Where, as in

the instant matter, the defendant is not the owner of the dog, but was merely the landlord of a premises where the dog was kept, that defendant did not have a responsibility to prevent a dog bite incident that occurred off the defendant's property. Sedeno v. Luciano, 34 AD3d 365 (1st Dept. 2006).

The thrust of the plaintiff's opposition focuses on the holding in Sarno v. Kelly, 78 AD3d 1157 (2nd Dept. 2010). In Sarno, supra, the Court determined that in certain limited circumstances, a property owner may be held liable in a dog bite case even when the event occurs off of the land owner's property.

The Court in Sarno, determined that three factors must be demonstrated by the plaintiff to be successful in overcoming a motion for summary judgment. These factors are as follows:

1. That the landlord had notice that the dog was being harbored on his property;
2. That the landlord knew or should have known of the dog's vicious propensities; and
3. That the landlord had sufficient control of the premises to remove or confine the dog.

In considering the above listed factors, there is no dispute that defendant Bouchardy had knowledge that defendant South had a number of dogs on the property.

Unfortunately, the plaintiff's arguments fail on factor #2. The information presented is pure speculation, not substantiated by any factual basis. Included within the plaintiff's exhibits was an affidavit from an individual who claims to have been attacked by defendant South's dogs on a prior occasion. However, it must be noted that that individual never contacted defendant Bouchardy prior to the events of December 30, 2015 to place him on notice.

The only stated fact that the plaintiff can attribute to establishing the knowledge factor is that defendant South's dogs did not get along with defendant Bouchardy's dog.

Lastly, it should be noted that in considering factor #3, defendant South provided the means to confine the dogs in question and, as such, the landlord, defendant Bouchardy, is not responsible under this factor.

Accordingly, it is hereby

ORDERED that defendant Bouchardy's motion for summary judgment is granted in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: Poughkeepsie, New York
November 2, 2018

HON. EDWARD T. McLOUGHLIN
Acting Justice Supreme Court

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