Kijek v West
2019 NY Slip Op 30608(U)
February 26, 2019
Supreme Court, Westchester County
Docket Number: 66639/16
Judge: Lewis J. Lubell

SCP 3/26/19 @ 9:15 a.m.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF WESTCHESTER

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MICHELE KIJEK and JOHN KIJEK,

Plaintiffs,

-against -

LYNN WEST, STANLEY WEST, BOARD OF MANAGERS OF LAKESIDE OF BEDFORD CONDOMINIUM, KATONAH MANAGEMENT GROUP, INC., JANE McCONNELL and JASON WELSCH,

Defendants.

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DECISION & ORDER

Index No.66639/16

Sequence No. 3-5

LUBELL, J.

The following papers were considered in connection with **Motion Sequence 3** by defendants Jane McConnell and Jason Welsch for an Order (i) dismissing the plaintiff's complaint pursuant to CPLR 3212 since liability does not exist with regard to the defendant Jane McConnell, on the grounds that she is an out-of-possession landlord; (ii) dismissing the complaint pursuant to CPLR 3212 since liability does not exist with regard to the defendant, Jason Welsch, on the grounds that he has no ownership interest in the premises; (iii) alternatively, permitting the defendants to amend their answer pursuant to CPLR 3205 to include the affirmative defense of limited liability pursuant to the provisions of Article 16 of the CPLR; and **Motion Sequence 4** by plaintiffs for an Order (1) pursuant to CPLR 3212 granting plaintiffs summary judgment on the issue of liability against defendants Lynn West, Stanley West, Board of Managers of Lakeside of Bedford Condominium, Katonah Management Group, Inc. and Jane McConnell; (2) pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of her freedom from comparative negligence (3) setting the case down for a trial as to damages only; **Motion Sequence 5** by defendants Board of Managers of Lakeside of Bedford Condominium and Katonah Management Group, Inc. for an Order pursuant to CPLR 3212 granting summary judgment and dismissing plaintiffs' complaint:

PAPERS	NYSCEF
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-P	82-100
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-GG	101-135
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-AA	136-164
AFFIRMATION IN OPPOSITION	166
AFFIRMATION IN OPPOSITION/EXHIBITS A-H	167-176
AFFIRMATION IN OPPOSITION/EXHIBITS A-B	177-180
AFFIRMATION IN OPPOSITION	184
REPLY AFFIRMATION	185,186
REPLY AFFIRMATION	187,188
REPLY AFFIRMATION	189

Plaintiffs bring this action in connection with an October 1, 2016, occurrence during which plaintiff, Michele Kijek, was attacked by a 100 pound dog, a chocolate Labrador retriever named "Harrison" a/k/a "Harry", on the common property of the Lakeside of Bedford Condominium complex (the "Condominium Complex") while being walked by one of its owners, defendant Lynn West. As a result of the incident, plaintiff sustained injuries to her right arm including multiple lacerations and puncture wounds requiring surgical intervention.

Harrison is owned by defendants, Lynn West and Stanley West ("Wests"). At the time of the incident, the Wests were tenants in a unit of Condominium Complex (the "Unit") which was owned by defendant, Jane McConnell. The Condominium Complex is run by defendant, the Board of Managers of Lakeside of Bedford Condominium (the "Board"), and is managed by defendant, Katonah Management Group, Inc. ("Katonah").

The October 1, 2016, attack underlying this action was preceded by another attack on July 29, 2016, during which the Wests' dog, Harrison, attacked plaintiff's dog, "Cooper".

More particularly, the July 2016 attack took place while plaintiff's 13 year old daughter was walking Cooper in a parking lot of the Condominium property. The two dogs were approximately 15 feet apart when, in response to Cooper's "yapping", Harrison, who was being walked by Mrs. West, pulled on his leash causing Mrs. West to be pulled to the ground while Harrison ran towards Cooper. As a result, Mrs. West struck the ground resulting in her loss of consciousness and a laceration to her head requiring stitches. However described by Mrs. West, there is no dispute that she had lost control of Harrison.

Plaintiff learned of the incident in response to hearing her daughter's screams whereupon she observed her daughter holding

Cooper up in the air while Harrison was jumping up trying to get Cooper. In response to plaintiff's attempt to distract Harrison, Harrison began running towards plaintiff and then proceeded to run around the parking lot as people came out of their homes and started yelling at Harrison to try and get him under control.

As a result of the attack, plaintiffs' daughter sustained minor scratches. Cooper sustained multiple puncture wounds, bite marks, and soft tissue damage requiring veterinary care and treatment.

The police came to the scene and prepared a police report consistent with the above narrative. Upon further investigation, Mrs. West was charged with, and ultimately plead guilty to, a violation of the Town of Bedford Dog Control Ordinance Section 48-5-f, which makes it unlawful for an owner of a dog to "Be off the premises owned or leased by the owner or harborer of said dog unless said dog is under the visual, voice or sound control of its owner or a responsible person able to control the dog" (Town of Bedford Code 48-5-f).

Distilled to the essential facts, plaintiffs have come forward with sufficient proof in admissible form establishing that both dogs were being walked in a common area of the Condominium when Harrison, the 100 pound dog, pulled away from Mrs. West causing Mrs. West to be pulled to the ground and knocking her unconscious. Thereupon, Harrison proceeded to attack plaintiff's 13 year old daughter and their 15 pound dog Cooper.

The facts underlying the October 1, 2016, incident include the following.

Plaintiff was walking Cooper on the Condominium property whereupon she observed Harrison on an "island" in the parking lot being walked by Mrs. West approximately 30 to 40 feet away. Upon seeing Harrison, plaintiff picked up Cooper. Plaintiff then heard Mrs. West yell, "Harry, Harry, stop". Thereupon, Mrs. West was pulled to the ground by Harrison as Harrison began charging at plaintiff and Cooper. Plaintiff turned her back towards Harrison, whereupon Harrison bit plaintiff's right arm and starting shaking her arm until he tore off her skin. Harrison then bit plaintiff again on the back of her right elbow, shook plaintiff and eventually pulled plaintiff to the ground. All in all, plaintiff was bitten about four times.

All parties now move for summary judgment in their favor. The motions are denied.

> Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; Andre v. Pomeroy, 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]; Winegrad v. NY Univ. Medical Cntr., 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see Alvarez, 68 N.Y.2d at 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735, 853 N.Y.S.2d 526, 883 N.E.2d 350 [2008]; Olisanr, LLC v. Hollis Park Manor Nursing Home, Inc., 51 A.D.3d 651, 652, 857 N.Y.S.2d 234 [2d Dept. 2008]; Greenberg v. Manlon Realty, 43 A.D.2d 968, 969, 352 N.Y.S.2d 494 [2d Dept. 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81, 760 N.Y.S.2d 397, 790 N.E.2d 772 [2003]; Zuckerman v. City of NY, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718 [1980]).

(Smith v. Linden Brewery, Inc., 61 Misc 3d 440, 442-43 [Sup Ct 2018]).

It is well established in the State of New York that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities" (Collier v. Zambito, 1 NY3d 444, 446 [2004] citing Hosmer v. Carney, 228 N.Y. 73, 75, 126 N.E. 650 [1920]; see also Restatement [Second] of Torts §509).

> An owner's strict liability for damages arising from the vicious propensities and vicious acts of a dog "extends to a person who harbors the animal although not its owner" (Molloy v. Starin, 191 N.Y. 21, 28, 83 N.E. 588; see Brice v. Bauer, 108 N.Y. 428, 431, 15 N.E. 695; see also Arbegast v. Board of Educ. of S. New Berlin Cent. School, 65 N.Y.2d at 164, 490 N.Y.S.2d 751, 480 N.E.2d 365). Liability can be established where the defendant "owned, possessed, harbored, or exercised dominion and control over the dog" (Powell v. Wohlleben, 256 A.D.2d 396, 396, 681 N.Y.S.2d 580 [emphasis added]). "It is not material in actions of this character whether the defendant is the owner of the dog or not. It is enough for the maintenance of the action that he [or she] keeps the dog; and ... harboring a dog about one's premises, or allowing it to be or resort there, is a sufficient keeping to support the action" (Quilty v. Battie, 135 N.Y. at 204, 32 N.E. 47 [the husband's dog was harbored by his wife when she permitted it to be kept in the house which she owned and where she resided]; see also Dufour v. Brown, 66 A.D.3d at 1218, 888 N.Y.S.2d 219 [the defendant harbored her boyfriend's dog when she allowed it to reside in the home which she owned and where she lived]; Belyski v. Pedone, 240 A.D.2d at 609, 659 N.Y.S.2d 1007 [the dog was harbored in the home of the defendants where the dog's owner resided]).

(Matthew H. v. County of Nassau, 131 AD3d 135, 144-45 [2d Dept 2015]). Furthermore, "[t]he owner or a party in control of premises may be held liable for injuries resulting from a dog bite that occurred off the premises if it had knowledge of the vicious propensities of the dog and had control of the premises and the capability to remove or confine the animal" (Hall v. United Founders, Ltd., 112 AD3d 530, 530 [1st Dept 2013] citing Joe v. Orbit Indus., 269 A.D.2d 121 [1st Dept. 2000]; Cronin v. Chrosniak, 145 A.D.2d 905, 906 [4th Dept. 1988]).

Defendants Board and Katonah may be subject to liability even though they constitute the condominium board and managing agent, respectively (see Pargament v. Oaks at Latourette Condo, 1, 2, 3, 4, 30 Misc 3d 319, 322 [Civ Ct 2010] [relationship between

condominium association and residents of units is analogous to that between a landlord and an occupant of its property, such that liability may be imposed upon a condominium association where it possesses actual or constructive notice of the animal's vicious propensities]; Velez v Andrejka, 126 AD3d 685 [2d Dept 2015] [summary judgment in favor of building owner and management company reversed in that there existed triable issues of fact regarding whether subject dog had vicious propensities and, if so, whether defendants had knowledge of, or should have had knowledge of those propensities prior to incident]).

In addition to the above, plaintiffs have come forward with sufficient evidence in admissible form establishing that each defendant was on notice of Harrison's vicious propensities by virtue of their own observations, correspondence, and/or oral communications.

At the outset, summary judgment is granted in favor of defendant Jason Welsch, who, among other things, neither owned, possessed, harbored, or exercised dominion and control over the dog and neither "had control of the premises and the capability to remove or confine the animal" (Hall v. United Founders, Ltd., supra).

As to all remaining defendants, however, the Court finds that plaintifs have come forward with sufficient proof in admissible form establishing entitlement to judgment in their favor as a matter of law and, in response thereto, defendants have failed to raise a triable issue of fact.

Among other things, plaintiff has established that each defendant knew of should have known of the vicious propensity of Harrison and had sufficient control of the premises and the capability to remove or confine the animal. The Wests defendants as the owners of Harrison, Ms. McConnell, as the landlord and Unit owner, and the Board and Managing agent by virtue of the authority and control they have over the Unit and the common areas of the Condominium property as is evidenced by virtue of, among other things, the various correspondence of their counsel and/or agents.

Based upon the foregoing, it is hereby

ORDERED, that summary judgment as to liability is granted in favor of plaintiffs and against all defendants except defendant, Jason Welsch, against whom the compliant is dismissed and, to any further extent, the motions are denied.

The parties are to appear on Tuesday, March 26, 2019 at 9:15

a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Blvd, White Plains, New York, prepared to conduct a settlement conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York
February 26, 2019

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