

<b>Sigmund v Porreca</b>
2019 NY Slip Op 34313(U)
December 24, 2019
Supreme Court, Westchester
Docket Number: Index No. 54223/2019
Judge: Terry Jane Ruderman
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To commence the statutory time 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

-----X  
JESSICA SIGMUND,

Plaintiff,

Index No. 54223/2019

-against-

DECISION and ORDER  
Motion Sequence No. 3

CHRISTOPHER PORRECA, FRANCIS J. PORRECA  
and ROSEMARY PORRECA,

Defendants.  
-----X

RUDERMAN, J.:

The following papers were considered on the motion by defendants Francis Porreca and Rosemary Porecca (the moving defendants) pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against them:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - G, and Memorandum of Law	1
Affirmation in Opposition, Exhibits A - C	2
Reply Affirmation	3

This action arises out of plaintiff Jessica Sigmund's claim that she was bitten by a dog belonging to defendant Christopher Porreca while she was a guest at the home of Francis and Rosemary Porecca on January 10, 2019. Plaintiff's original complaint sounded in negligence, and this Court granted the previous motion by the moving defendants to dismiss on the ground that such an action may only be brought on a strict liability theory (*see Bard v Jahnke*, 6 NY3d 592 [2006]; *Collier v Zambito*, 1 NY3d 444 [2004]); however, the decision and order also granted plaintiff's cross-motion to amend her complaint insofar as it permitted her to plead a

strict liability cause of action, since it was alleged that all three defendants knew of the animal's vicious propensity and that the moving defendants harbored the animal (*see Matthew H. v County of Nassau*, 131 AD3d 135, 144 [2d Dept 2015]).

Plaintiff filed an amended complaint that again included a cause of action alleging negligence, but added a second cause of action sounding in strict liability. Defendants Francis Porreca and Rosemary Porreca now move for an order pursuant to CPLR 3211(a)(1) and (7), dismissing plaintiff's amended complaint, based upon documentary evidence and for failure to state a cause of action. Plaintiff opposes.

#### Discussion

To the extent the amended complaint includes a cause of action sounding in negligence, it must be dismissed; this Court previously held that no such cause of action may be maintained (*see Bard v Jahnke*, 6 NY3d 592 [2006]; *Collier v Zambito*, 1 NY3d 444 [2004]).

As to plaintiff's strict liability claim, the moving defendants submit and rely on their own affidavits, in which they assert that they do not own the subject dog and did not harbor, control, maintain or care for the dog at the time of the incident, since the dog's owner, their son, defendant Christopher Porreca, was merely a temporary guest in their home at the time.

The affidavits of the moving defendant cannot serve as the basis for dismissal under CPLR 3211 (a) (1). A complaint must be dismissed on the basis of documentary evidence only if the submitted documentary evidence *conclusively* establishes a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994] [emphasis added]). "[I]t is clear that affidavits and deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211 (a) (1) motion to dismiss" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept

2010)).

As to the branch of the motion seeking dismissal under CPLR 3211 (a) (7), since the movants have submitted extrinsic evidence in support, the court does not merely examine the pleading's allegations to determine whether they "manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]), but rather, the court must decide whether the factual claims of the pleading have been negated beyond substantial question by the extrinsic evidence (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). The court need not accept as true "legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence" (*Greene v Doral Conference Ctr. Assoc.*, 18 AD3d 429, 430 [2d Dept 2005]).

The moving defendants rely on the rule that "liability will not be imposed when there is no evidence that the defendant owned, possessed, harbored, or exercised dominion and control over the dog" (*Powell v Wohleben*, 256 AD2d 396, 396 [2d Dept 1998]), and they assert in their affidavits that they did not own, harbor, or exercise dominion and control over the their son's dog on the day in question, and that therefore they are entitled to dismissal of the complaint.

The extrinsic evidence submitted by the moving defendants does not demonstrate proper grounds for dismissal under CPLR 3211 (a) (7). Plaintiff's allegations that the moving defendants harbored the dog, knowing of its vicious propensities, are neither legal conclusions nor inherently incredible. While they are contradicted by the moving defendants' denials of those allegations, those denials do not negate the claim, but merely dispute it. The cases relied on by the moving defendants for the proposition that ownership of the premises on which the plaintiff was bitten does not alone establish that the property owner "harbored" the animal (*see*

*e.g. Zwinge v Love*, 37 AD2d 874 [3d Dept 1971]) do not warrant dismissal at this juncture.

Notably, the cases on which the moving defendants rely, holding that “defendant met its burden of establishing entitlement to judgment as a matter of law by submitting evidence that it did not own or control the dog that bit the infant plaintiff” (*see e.g. Schwartz v Nevatel Communs. Corp.*, 8 AD3d 469 [2d Dept 2004]), address summary judgment motions, brought after the plaintiffs completed discovery. Plaintiff has not yet had the opportunity to engage in discovery and depose defendants.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint is granted as to plaintiff’s first cause of action and is otherwise denied, and it is further

ORDERED that the parties are directed to appear on Monday, February 10, 2020 at 9:30 a.m., in the Compliance Conference Part of the Westchester County Supreme Court, room 811, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
December 24, 2019

  
HON. TERRY JANE RUDERMAN, J.S.C.