

<b>Castelluccio v Hudson</b>
2020 NY Slip Op 34475(U)
February 24, 2020
Supreme Court, Orange County
Docket Number: EF008228-2016
Judge: Sandra B. Sciortino
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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 ORANGE

-----X  
**SUZANNE CASTELLUCCIO,**

Plaintiff,

**DECISION AND ORDER**  
**Index No.: EF008228-2016**

-against-

**Motion Date: 12/19/2019**  
Sequence No. 2

**KAREN HUDSON and PHILLIP HUDSON,**  
Defendants.

-----X

**SCIORTINO, J.**

The following papers numbered 1 to 13 were considered in connection with the application of defendants KAREN HUDSON and PHILLIP HUDSON (defendants HUDSON) for summary judgment dismissing the complaint of plaintiff:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation/Exhibits A-G	1 - 8
Plaintiff's Affirmation in Opposition/Affidavit/Exhibit 1 - 2	9 - 12
Reply Affirmation	13

Upon the foregoing papers it is ORDERED that the motion for summary judgment brought by defendants Hudson is denied in all respects.

**Background and Procedural History**

This personal injury action arises out of a dog bite which occurred on May 12, 2016 in the driveway of a home located at 13 Kent Street in Rock Hill, New York 12775, County of Sullivan, where defendants Karen Hudson and Phillip Hudson resided. Plaintiff commenced this action by filing a Summons and Complaint on December 6, 2016. Defendants Hudson served a Verified Answer on or about January 23, 2017.

Defendant Kate Hudson, in her deposition, testified that, on May 12, 2016, she and plaintiff Suzanne Castelluccio were traveling to Middletown when they stopped by the Hudson house in Rock Hill. Hudson exited the van and approached the chain-linked pen, which contained her Siberian husky, Charlie. The fence of the pen was approximately five feet high and extended to her garage. Defendant approached the gated pen, and Charlie jumped up with his front paws on the fence; she then went back toward the vehicle to retrieve her house keys. Plaintiff saw Ms. Hudson pet the husky. Plaintiff asked for and was granted permission to pet Charlie. Hudson then proceeded from the van to her front door.

Plaintiff testified, at her deposition, that she had never met Charlie before the date of the incident. She approached Charlie, who jumped up on the fence with his front paws. She extended her hand through the fence toward Charlie, which he smelled for approximately 15 seconds. Plaintiff then reached over the fence to pet Charlie on the back of his neck with both hands. Immediately after placing her hands over the fence, Charlie lunged at her and bit her face.

Ms. Hudson testified that she was putting her key in the door of her house when she heard Charlie bark and turned to see the injured plaintiff backing away from the gate. Ms. Hudson also testified that, as she was walking up the stairs to her door, immediately prior to the bite, she observed plaintiff rubbing Charlie's back. After the bite, plaintiff immediately got back into the van and traveled to Catskill Regional Hospital.

Defendant Phillip Hudson testified at his deposition that, other than the May 12, 2016 incident, Charlie has never bitten or lunged at another person. He further testified that Charlie has never growled at another person, nor has he received any complaints about Charlie before or after May of 2016.

Non-party witness Christian Gonzales testified, at a deposition, that she has delivered the mail to 13 Kent Street in Rock Hill, the Hudson residence, for the past twelve years and was familiar with Charlie. Ms. Gonzales testified that, when she got close to Charlie's enclosure, he would start barking. Ms. Gonzales also testified that she was scared of Charlie and described him as "very aggressive." Counter to the claims by defendants, Ms. Gonzales has also testified that Mr. Hudson has observed Charlie growl and show his teeth when she approaches the house. Ms. Gonzales testified that, due to Charlie's barking, Mr. Hudson has permitted Ms. Gonzales to leave packages away from the door. She further testified that she told Mr. Hudson that she was afraid of Charlie, and would not approach the house to deliver packages.

### **Motion for Summary Judgment**

By Notice of Motion filed October 11, 2019, the defendants Hudson seek summary judgment dismissing the Complaint on the assertion that defendants' dog Charlie did not exhibit any vicious propensities on or before on May 12, 2016. Through affirmation of counsel, defendants aver they had no notice of Charlie's vicious propensities. Defendant's counsel avers that, while plaintiff did request and was granted defendant's permission to pet Charlie, plaintiff unilaterally initiating contact with Charlie was the sole proximate cause of her injuries. Defendant's counsel also argues that, because plaintiff approached Charlie of her own accord and hugged Charlie with both hands, she assumed the risk by partaking in an activity she knew to be potentially dangerous.

### **Opposition**

In opposition, plaintiff, through affirmation of counsel, asserts that Charlie had vicious propensities, as demonstrated by the testimony of non-party witness Christian Gonzales, and that the defendants either had knowledge of Charlie's propensities or reasonably should have had knowledge. Plaintiff's counsel further avers that plaintiff was not aware of the risks; had no

appreciation of the nature of the risks, and did not voluntarily assume the risk. Plaintiff's counsel bases this assertion on the fact that plaintiff had never met Charlie before and had never been told that the dog was vicious or aggressive.

### Reply

In reply, defendant's counsel states that, because plaintiff had been bitten by a dog before, she had the necessary knowledge and experience to be aware of and appreciate the risk of approaching an unfamiliar dog. Plaintiff has failed to raise a triable issue of fact sufficient to prevent the Court from granting summary judgment.

### Discussion

For the purposes of this motion, the statements made by the non-moving party are accepted as true. (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499 [2012]) Summary judgment is a drastic remedy, and may be granted only when the moving party has tendered sufficient evidence to demonstrate the absence of any material issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Where there is any doubt about the existence of fact issues, summary judgment is inappropriate. (*Stillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957])

On a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. (*Vega, supra*) The submissions of the non-moving parties must be accepted as true, for purposes of the motion. (*Ingle v. Glamore Motor Sales*, 73 N.Y.2d 183 [1989])

The law imposes strict liability on the owner of a dog who inflicts injuries on others, if the owner knew or should have known that the dog had the propensity to be vicious. (*Powell v. Wohlleben*, 256 A.D.2d 396 [2d Dept 1998]). Vicious propensities include the "propensity to do any act that might endanger the safety of the persons and property of others in a given situation." (*Collier v. Zambito*, 1 N.Y.3d 444, 446 [2004]). Evidence of a dog's vicious propensity can include

whether the dog had previously bitten someone, the manner in which the dog was restrained, whether the dog had been known to growl, snap, or bear its teeth, or the dog's "proclivity to put others at risk of harm." (See, generally, *Collier v. Zambito*, 1 N.Y.3d 444, 447 [2004]; *Bard v. Jahnke*, 6 N.Y.3d 592, 597 [2006]). For defendants to be entitled to judgment as a matter of law, they must establish that they were not aware, nor should they have been aware, that their dog had ever bitten anyone or exhibited any aggressive behavior. (*Carroll v. Kontarinis*, 150 A.D.3d 960 [2d Dept 2017], citing *Collier*, 1 N.Y.3d at 447; *Jackson v. Georgalos*, 133 A.D.3d 719, 720 [2d Dept 2015]; *Hodgson-Romain v. Hunter*, 72 A.D.3d 741 [2d Dept 2010])

In order for the Court to consider assumption of the risk in a dog bite case brought under a strict liability theory, it must first be established that the dog had the propensity to be vicious. Once that has been established, defendants have the burden of proving that "the injured plaintiff had full knowledge of the dog's character and voluntarily brought the injury upon himself." (See generally, *Pisciotta v. Parisi*, 155 A.D.2d 422 [2d Dep't, 1989]; *Scharf v. Manson*, 27 A.D.2d 613, 614 [3<sup>rd</sup> Dep't 1966]; *DiGrazia v. Castronova*, 48 A.D.2d 249, 251 [4<sup>th</sup> Dep't 1975]).

Defendants Hudson assert that on or before May 12, 2016, they were unaware that their dog, Charlie, was prone to any vicious propensities. Phillip Hudson testified that, other than the alleged bite on May 12, 2016, Charlie has never bitten or lunged at another person and never growled at another person. Hudson claims to have never received complaints about Charlie before or after the May of 2016 incident.

Defendants attempt to use their deposition as a dispositive showing that Charlie lacked a vicious propensity, but provide no other evidence to support such an assertion. The instant matter is markedly similar to *Varvaro v. Belcher*, 65 A.D.3d 1225 [2d Dept 2009] where, "defendant failed to sufficiently establish, *prima facie*, that her dog did not have vicious propensities and that she did

not know or have reason to know of such propensities.” (*Id.* at 1225-1226) Where, in review of a motion for summary judgment, triable issues of fact are raised as to whether a dog had vicious propensities, or whether the dog’s owner knew or should have had knowledge of these propensities, the case cannot be disposed of through summary judgment. (*Velez v. Andrejka*, 126 A.D.3d 685, 686 [2d Dept 2015]). In *Velez*, the Second Department held that the trial court decision granting summary judgment based on defendants sole claim that they lacked knowledge of a dog’s vicious propensity was inappropriate where the evidence raises triable issues of material facts. In the case at bar, defendant’s only support that Charlie lacked vicious propensities is the testimony of Karen Hudson and Phillip Hudson, defendants in this action, who claim to have lacked knowledge of Charlie’s vicious propensity at the time of the alleged incident.

While it may be that Charlie has not previously bitten anyone prior to May 12, 2016, there is a triable issue of material fact regarding whether Charlie had exhibited any aggressive behavior prior to allegedly biting the plaintiff. According to the testimony of non-party witness Christian Gonzales, Charlie was “very aggressive,” and that Mr. Hudson had observed Charlie growl and show his teeth when she approached the house. Ms. Gonzales also testified that Charlie was kept in a fenced-in enclosure. There is also a dispute as to whether defendants had a “beware of dog” sign on the premises. Ms. Gonzales testified that defendants “always had a [beware of dog] sign” on the premises. Defendant Karen Hudson testified that, in May of 2016, there were no such signs on the premises.

While deposition testimony does not establish conclusively that Charlie was prone to vicious propensities, Charlie’s enclosure in a chain-linked fence, the presence of a “beware of dog” sign, and Ms. Gonzales’ testimony may support such an inference. (*See Collier*, 1 N.Y.3d at 447). Thus, while Christian Gonzales’ testimony does not prove Charlie was prone to a vicious propensity, it

does raise an issue of fact of whether Charlie had a vicious propensity, and whether defendants were aware that Charlie could exhibit aggressive behavior. Because this issue cannot be resolved at this stage in the litigation, this is an issue to be resolved by a jury.

Defendants have failed to demonstrate that they are entitled to judgment as a matter of law because they have failed to provide sufficient evidence that Charlie did not have any vicious propensities. Looking at the evidence in the light most favorable to the non-moving party, there is an issue of material fact with respect to whether Charlie had any vicious propensities. As it has not been established that Charlie had a vicious propensity, this Court need not address assumption of the risk.

The dispute in this matter turns solely on whether Charlie, the dog of defendants Hudson, exhibited any evidence of vicious propensities either on or before May 12, 2016, the date plaintiff was allegedly bitten. The function of the Court is issue finding, and not issue determination. (*Giglio v. Marino*, 2 Misc. 3d 443 [2003], citing *Ingle, supra*). Accepting the argument of plaintiff, and the testimony of defendants Hudson as well as non-party witness Christian Gonzales as true, as the Court is constrained to do on a summary judgment motion, defendants have failed to demonstrate a *prima facie* entitlement to judgment as a matter of law. The question of the whether defendants' dog Charlie had a vicious propensity at the time he allegedly bit plaintiff on May 12, 2016 is a triable issue of fact which must be determined by a jury.

The parties shall appear for a settlement conference on April 2, 2020 at 9:15 a.m.

This decision shall constitute the order of the Court.

Dated: February 24, 2020  
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of record via NYSCEF*