

**Lawrence v Tobal**

2020 NY Slip Op 35048(U)

October 22, 2020

Supreme Court, Orange County

Docket Number: Index No. EF000588-2019

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK  
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY  
-----X

CASSANDRA LAWRENCE  
Plaintiff,

- against-

To commence the 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.

BRANDON TOBAL,  
Defendant.

Index No. EF000588-2019

-----X  
BRANDON TOBAL,  
Third-Party Plaintiff,

**DECISION AND ORDER**

- against-

Motions ##1 & 2- October 7, 2020

TONY NICHOLAS EUCEDA a/k/a  
TONY ZAVALA,  
Third-Party Defendant.

-----X

The following papers numbered 1 through 13 were read and considered on (1) a motion by the Defendant, pursuant to CPLR § 3212, for summary judgment dismissing the complaint; and (2) a cross motion by Plaintiff to consolidate and/or join the action at bar with an action entitled *Adirondack Insurance Exchange v Lawrence*, pending in Supreme Court, New York County, under Index No. 154865-2019.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted, and the cross motion is denied as moot.

**Introduction**

On February 1, 2018, the Plaintiff Cassandra Lawrence was allegedly injured while living at 289 First Street in Newburgh, New York, when she was bit by a dog owned by Third-Party Defendant Tony Euceda.

Lawrence commenced an action against Euceda, entitled *Lawrence v Euceda*, in the Supreme Court, Orange County, under Index No. EF003543-2018. On February 21, 2019, Lawrence was awarded money damages as against Euceda after he defaulted in the action.

In January of 2019, Lawrence commenced this action against the Defendant Brandon Tobal, the owner of the premises at which Euceda (and the dog) were living at the time of the incident.

Tobal moves for summary judgment seeking dismissal of the complaint on the grounds, *inter alia*, that he lacked notice that the dog at issue had vicious propensities.

Lawrence cross moves to join the action at bar with an action entitled *Adirondack Insurance Exchange v Lawrence*, pending in Supreme Court, New York County, under Index No. 154865-2019 (hereinafter the “Adirondack Action”). That action was brought by Tobal’s insurance company to determine whether there is coverage for the incident.

The motion is granted, and the cross motion is denied as moot.

### Factual/Procedural Background

At an examination before trial, Lawrence testified as follows.

At the time in question (on or about February 1, 2018), she was living at 289 First Street in Newburgh, New York. She owned a female Yorkshire terrier named "Princess." A neighbor "Tony" owned a pit bull named "Luna." Luna was generally kept in a fenced-in area.

On the day at issue, she was going to work. As she was at her vehicle, she heard "like nails" on the pavement. She turned around and saw "Luna coming from down the street running full force." She went to grab Princess from her stoop. However, before she could get there, Luna grabbed Princess in her mouth and started shaking her. Lawrence began kicking at Luna with a cam boot she was wearing, but Luna was not letting go. Luna finally let go and she grabbed Princess, but Luna snatched her back. She was screaming and yelling but nobody came. During the struggle, Luna bit her left hand. The owner then came out, restrained Luna and freed Princess. Lawrence and Princess were both bleeding, and Lawrence went to the hospital.

She had no further incidents involving Luna, as she took precautions.

To her knowledge, Luna had never attacked any other person.

Prior to the incident at issue, sometime around August of 2017, Luna walked into her kitchen. She tried talking softly, saying "Get out, Luna. Go out, Luna." However, Luna grabbed Princess and they were in the "vestibule tussling." Her fiance' grabbed Luna and she grabbed Princess. She and her fiance' were both "scratched up." She did not seek medical assistance, and took no further action because Tony promised her that he would keep Luna away.

Also, one a prior occasion, Luna got into her yard, "but she didn't attack. We got her away from her before she could." However, children "couldn't really play in the backyard because they

were scared that Luna would come into the yard. They were little ones.”

She also heard that Luna had attacked a dog around the corner.

The Defendant Brandon Tobal moves for summary judgment seeking dismissal of the complaint.

In support of his motion, Tobal submits his own affidavit. Tobal avers as follows.

Lawrence alleges that she was bitten on February 1, 2018, while living at 289 First Street, Newburgh, New York, by a dog owned by Tony Euceda, who was an occupant/tenant at 287 First Street, Newburgh, New York. At that time, Tobal notes, he was the owner of 287 First Street, but not the owner of 289 First Street. However, he did not live there. Rather, although he lived at 287 First Street for about four to six weeks in the summer of 2017, he thereafter moved out to live with his family in New Jersey.

In the fall of 2017, he rented 287 First Street to non-party Lazarus Santos. Santos, in turn, rented out some of the bedrooms in 289 First Street to sub-tenants, including men named “Eddie” and “Tony,” as well as a woman whose name he did not recall. He was unsure of Tony's last name, but had no reason to dispute that it was Euceda.

He was aware that Tony had a dog, although he did not recall the date he first found out, and he did object to the dog.

Tobal went to 287 First Street basically on a monthly basis to pick up the rent. When he was there, he noticed Tony's dog. When he met the dog, he petted it and the dog appeared friendly to him. He recalled telling the dog to come to him, and it did. The dog never snarled at him, bared its teeth, charged at him or was in any way aggressive toward him. Nor did he see the dog snarling, baring its teeth, charging or being aggressive toward anyone else.

He recalled seeing the dog with Tony in the building and in the backyard of 287 First Street, but not in the back yard of the house next door at 289 First Street.

He did not see Tony's dog with any other dog, and did not witness Tony's dog attacking Lawrence or any other person or animal.

The first time he was advised in any way of a claim that Tony's dog had attacked someone or something was when he received the Summons and Complaint in this action.

Finally, he notes, Tony no longer resides at 287 First Street, as he was evicted for non-payment of rent prior to the commencement of this action. He does not know where Tony currently resides. Thus, he has not been able to discuss the allegations with Tony.

In opposition to Tobal's motion, Lawrence submits an affirmation from counsel, Stephen Strauss.

Strauss argues that the motion is premature because disclosure is not complete. Indeed, he notes, the Third-Party Defendant Tony Euceda has yet to appear and be deposed in the matter. Strauss argues that Euceda has "necessary information regarding this matter as well the necessary information that is needed to fully oppose the motion."

In any event, Strauss asserts, in support of the motion, Tobal relies merely on his own self-serving testimony concerning a lack of notice. Thus, Strauss argues, Euceda's testimony is "necessary to affirm these self-serving statements." That is, the Court should not take Tobal's statements at face value. Indeed, he asserts, Tobal committed fraud as to the property by representing it as his primary residence. In fact, he notes, he is being sued by his own insurance company as to the same (*infra*).

In addition, he argues, Tobal, as landlord, violated the town of Newburgh's rental laws, in

that he rented his two-family house to numerous people dividing the house into "rentable rooms" rather than a two family house and received violations for same from the town.

Finally, he asserts, the testimony already in the record raises triable issue of fact, to wit: Tobal admitted that he knew Euceda had a dog. "He states, very questionably, that he could not say if the dog was a PIT BULL. PIT BULLs are very specific looking dogs and there is a question of fact for a jury if the landlord knew that the dog was a PITBULL. The Plaintiff testified that prior to this PIT BULL attack the PIT BULL attacked the plaintiff once prior. She testified that the PITBULL entered her house, which is next door, and attacked her dog and herself."

In reply, counsel for Tobal, Richard Smar, argues that Tobal's motion for summary judgment is not premature. Indeed, he notes, such an argument is usually raised when the motion is made immediately after a case is commenced, prior to discovery taking place; especially when the party making the summary judgment motion has not been deposed. Here, he notes, Tobal has been deposed.

Moreover, he notes, "Strauss conveniently fails to mention that he filed a Note of Issue and Certificate of Readiness on March 13, 2020, certifying, *inter alia*, that "Discovery proceedings now known to be necessary [have been] completed." If Strauss believed that he needed the deposition of Euceda to support his claim against Tobal, Smar argues, he should have scheduled the same, or moved to extend the time to file the Note of Issue. Smar notes that Tobal was deposed on September 16, 2019, which is over a year ago, and some six months before the shutdowns for COVID-19.

Otherwise, he argues, Strauss merely makes unfounded and scurrilous claims that Tobal lied, committed mortgage fraud and insurance fraud, and violated of the City of Newburgh's

rental laws.

Lawrence cross moves to consolidate and/or join the action at bar with an action entitled *Adirondack Insurance Exchange v Lawrence*, pending in Supreme Court, New York County, under Index No. 154865-2019 (hereinafter “Adirondack Action”).

In support of the cross motion, Lawrence submits an affirmation from counsel, Stephen Strauss.

Strauss argues that the actions should be joined because both concern the dog bite at issue, and all parties have “affiliations with Orange County.” That is, the incident occurred in Orange County, Lawrence resides here, the dog was housed here; the incident took place here, the property where the incident occurred is here, and the Insurance policy at issue insured property here.

Thus, he asserts, the proof adduced in each case will be substantially the same and, because the parties and witnesses at the trial of each action all reside in Orange County, joinder will save time and expense, will be convenient for the parties and their witnesses and the Court, and will avoid a multiplicity of lawsuits.

Appended to the Plaintiff’s cross motion is, *inter alia*, the summons and complaint in the Adirondack Action. In the Adirondack Action, the plaintiff Adirondack Insurance Exchange (hereinafter “Adirondack”) alleges as follows.

Adirondack issued a Homeowner's Policy to Tobal in connection with the premises at issue, effective during the time of the dog bite at issue.

Adirondack notes the policy defines an “insured location” in pertinent part to include a “residence premises,” to wit: “a. The one family dwelling where you reside; b. The two family

dwelling where you reside in at least one of the family units; c. That part of any other building where you reside; and which is shown as the 'residence premises' in the Declarations."

In the Adirondack Action, Adirondack seeks a declaration that it has no duty to defend or indemnify Tobal because (1) the property at issue was not a "Residence premises" at the time of the incident; (2) because Tobal failed to notify Adirondack of the incident as soon as was reasonably possible; and (3) because Tobal falsely represented that the property was owner-occupied.

In opposition to the cross motion, counsel for Tobal, Michael Smar, argues that the only common factor between the two actions is some of the parties. Otherwise, he asserts, the actions have no common questions of law and/or fact.

In any event, he argues, consolidation should be denied due to prejudice to a substantial right of the opposing party, to wit: It is a widely held belief that the mere mention of a defendant's insurance carrier during a personal injury trial is prejudicial.

In further opposition to the cross motion, Adirondack submits an affirmation from counsel, James Croteau.

Croteau argues that it is well settled in New York that negligence actions should be tried separately from insurance-coverage actions because of the inherent prejudice in permitting a jury to know that there is insurance covering any damages that may be awarded.

In addition, he notes, Adirondack had already filed a substantive motion in the Adirondack Action, which was then on appeal before the Appellate Division, First Department.

#### **Discussion/Legal Analysis**

In general, the party seeking summary judgment bears the initial burden of establishing a

*prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2<sup>nd</sup> Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2<sup>nd</sup> Dept. 2011].

Pursuant to CPLR 3212(f), a motion for summary judgment may be denied as premature when it appears that facts essential to justify opposition may exist but cannot then be stated. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 [2<sup>nd</sup> Dept. 2009]. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 [2<sup>nd</sup> Dept. 2009]. However, the proponent must offer an evidentiary basis for a determination that disclosure might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the knowledge and control of the plaintiff. *Yiming Zhou v. 828 Hamilton, Inc.*, 173 A.D.3d 943 [2<sup>nd</sup> Dept. 2019]. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the disclosure process is insufficient to deny the motion. *Cortes v. Whelan*, 83 A.D.3d 763, 922 N.Y.S.2d 419 [2<sup>nd</sup> Dept. 2011]. Further, summary judgment may not be defeated on the ground that more disclosure is needed where the party advancing the argument has failed to ascertain the facts due to its own inaction. *Meath v. Mishrick*, 68 N.Y.2d 99 (1986); *Karakostas v Avis Rent A Car Sys.*, 301 A.D.2d 632 [2<sup>nd</sup> Dept. 2003].

To recover on a theory of strict liability in tort for a dog bite or attack against its owner, a plaintiff must prove that the dog had vicious propensities and that the owner knew or should have known of such propensities. *Carroll v. Kontarinis*, 150 A.D.3d 960 [2<sup>nd</sup> Dept. 2017]. Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm. *Carroll v. Kontarinis*, 150 A.D.3d 960 [2<sup>nd</sup> Dept. 2017]. The keeping of a dog as a guard dog may give rise to an inference that an owner had knowledge of the dog's vicious propensities. *Collier v. Zambito*, 1 N.Y.3d 444 (2004).

In general, the presence of a "Beware of Dog" sign, standing alone, is insufficient to impute notice of a dog's viciousness. *Vallejo v. Ebert*, 120 A.D.3d 797 [2<sup>nd</sup> Dept. 2014]; *Lugo v. Angle of Green, Inc.*, 268 A.D.2d 567 [2<sup>nd</sup> Dept. 2000]; *see also, Smedley v. Ellinwood*, 21 A.D.3d 676 [3d Dept. 2005]; *Shaw v. Burgess*, 303 A.D.2d 857 [3d Dept. 2003]. Further, the mere fact that a dog was kept enclosed or chained, or that barked at people, is insufficient to raise a triable issue of fact as to whether it had vicious propensities. *Collier v. Zambito*, 1 N.Y.3d 444 (2004).

In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities - albeit only when such proclivity results in the injury giving rise to the lawsuit. *Collier v. Zambito*, 1 N.Y.3d 444 (2004); *Bard v. Jahnke*, 6 N.Y.3d 592 (2006); *Carroll v. Kontarinis*, 150 A.D.3d 960 [2<sup>nd</sup> Dept. 2017].

To recover against a landlord for injuries caused by a tenant's dog, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises; (2)

knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to remove or confine the dog. *Kraycer v. Fowler St., LLC*, 147 A.D.3d 103 [2<sup>nd</sup> Dept. 2017].

The courts have not attempted to formulate an overarching definition of what constitutes “sufficient control of the premises” to impose liability. However, instances in which such control has been found include where the tenancy was month-to-month, and the landlord could have terminated the tenancy (*see e.g., Wilson v. Bruce*, 198 A.D.2d 664 [3<sup>rd</sup> Dept. 1988]; *Cronin v. Chrosniak*, 145 A.D.2d 905 [4<sup>th</sup> Dept. 1988]); where the landlord allowed the tenant to keep an animal in violation of a lease provision prohibiting the same (*see e.g., Baisi v. Gonzalez*, 97 N.Y.2d 694 (2002)) and where the landlord rented premises to a tenant known to possess an animal with vicious propensities (*see e.g., Strunk v. Zoltanski*, 62 N.Y.2d 572 (1984)).

Here, Tobal demonstrated a *prima facie* entitlement to judgment as a matter of law with his testimony that he had not personally observed, and had not otherwise been made aware of, any aggressive or vicious behavior by Luna.

In opposition, Lawrence failed to raise a triable issue of fact with evidence that Tobal had actual or constructive knowledge of prior aggressive or vicious behavior by Luna.

That Luna is, or appears to be, a pit bull, without more, is not enough. The Courts do not take judicial notice, or otherwise presume, that certain breeds or kinds of domestic animals are dangerous. *Bard v. Jahnke*, 6 N.Y.3d 592 (2006); *DeVaul v. Carvigo Inc.*, 138 A.D.2d 669 [2<sup>nd</sup> Dept. 1988].

Further, Lawrence did not demonstrate that the motion was premature. Indeed, as noted by Tobal, Lawrence filed a note of issue and a certificate of readiness. Further, as also noted by

Tobal, Lawrence did not demonstrate that any efforts were made to depose Euceda during this action.

In sum, Tobal's motion is granted and the complaint is dismissed.

In light of the foregoing, the Plaintiff's cross motion to consolidate is rendered moot.

In any event, had the cross motion been reached, it would have been denied. Neither consolidation nor joinder is appropriate. *CPLR 602; Oboku v. New York City Transit Authority*, 141 A.D.3d 708 [2<sup>nd</sup> Dept. 2016].

Finally, it is noted, because the Third-Party Action is derivative only, this motion practice deposes of the whole of the action.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted and the complaint is dismissed; and it is further,

ORDERED, that the cross motion is denied as moot.

The foregoing constitutes the decision and order of the Court.

Dated: October 22, 2020  
Goshen, New York

ENTER



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HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

TO: STEPHEN A. STRAUSS, ESQ.  
Attorney for the Plaintiff  
Office & P.O. Address  
1248 A Clintonville Street  
Whitestone, New York 11357

McCABE, COLLINS, McGEOUGH, FOWLER, LEVINE & NOGAN, LLP  
Attorney for Defendant/Third-Party Plaintiff Tobal  
Office & P.O. Address  
P.O. Box 9000  
346 Westbury Avenue  
Carle Place, New York 11514

LAW OFFICE OF JAMES J. CROTEAU  
Attorney for Non-Party Adirondack Insurance Exchange  
Office & P.O. Address  
10 Lanidex Plaza West  
Suite 130A  
Parsippany, New Jersey 07054

TONY NICHOLAS EUCEDA a/k/a TONY ZAVALA  
Third-Party Defendant  
(HAS NOT APPEARED)