

<b>Mohammed v Rahaman</b>
2020 NY Slip Op 35097(U)
March 30, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68459/2018
Judge: Sam D. Walker
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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  
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X  
VICTORIA MOHAMMED,

Plaintiff,

DECISION & ORDER  
Index No. 68459/2018  
Motion Sequence 1

-against-

SHEIK H. RAHAMAN, ESHWARIE RAHAMAN, and  
ASHLEE RAHAMAN, and John Does and Jane Does,

Defendants.  
-----X

The following papers were received and considered in connection with the above-captioned matter:

Notice of Motion/Affirmation/Exhibits A-H	1-10
Affirmation in Opposition/Exhibits 1-3	11-14
Memorandum of Law in Opposition	15
Supplemental Affirmation in Opposition/Exhibits 1, 3	16-18
Reply Affirmation	19

The plaintiff commenced this action on November 5, 2018, seeking damages for alleged injuries she sustained on December 2, 2017, when she was bitten by the defendants' dog while at the defendants' home.

The plaintiff, Victoria Mohammed, a then twenty three year old friend of the defendant, Ashlee Rahaman, alleges that, on the day of the incident, she arrived at the defendants' home at approximately 3:00 or 4:00 p.m., she let the dog, Rollie, sniff her and then she petted Rollie. The plaintiff states that she played tug of war with Rollie while she was there and when she was leaving at approximately 11:00 p.m., she squatted down to

take a picture with Rollie and he jumped on the plaintiff, biting off a portion of her upper lip.

The defendants now move pursuant to CPLR 3212, for summary judgment to dismiss the plaintiff's complaint arguing that the dog had no known vicious propensity at the time of the plaintiff's alleged incident and that pit bull terriers are not inherently vicious dogs.

In opposition, the plaintiff asserts that the issues of whether a dog has vicious propensities and whether the defendants knew or should have known about them, are generally issues of fact that preclude summary judgment in the defendants' favor. The plaintiff argues that the defendants must have known or suspected Rollie's temperament, because they confined the dog to the parents' bedroom when a stranger was in their home and displayed a "Beware of Dog" sign in the front of their home. The plaintiff also argues that Pit Bulls bite and/or attack more people than any other breed and are responsible for more deadly attacks than any other breed and are banned in many jurisdictions across the United States. The plaintiff also further argues that Rollie was not neutered and the majority of dog bites involve dogs that have not been neutered.

In reply, the defendants first contend that any incidents that occurred subsequent to the plaintiff's incident, cannot be used to determine Rollie's vicious propensities and are irrelevant. The defendants argue that, the fact that they sometimes put Rollie into a room as a precaution, when the dog was around new people, was not due to fear of Rollie attacking or biting anyone and they contend that the fact that the plaintiff was in Rollie's company on the date of the subject incident and on at least one prior occasion, shows that the habit was only for those with whom Rollie was not familiar.

The defendants further argue that foreign statutes are not persuasive and are of no

import and that the controlling cases state that it is error for the trial court to take judicial notice of vicious propensities of the pit bull breed. They also argue that the "Beware of Dog" sign does not lend to Rollie having vicious propensities and this case is distinguishable from the cases cited by the plaintiff with regard to this issue and more than this sign is necessary to show triable issues of fact.

The defendants finally argue that the article offered with regard to neutering does not rise to the level of admissible evidence and the fact that a dog is neutered does not suggest an aggressive or vicious dog and the plaintiff's assertions with regard to this are pure speculation. The defendants also discount the plaintiff's offering of an appellate term case in which the court directed neutering of the dog, contending that the decision is bereft of the purpose of the court's directive.

#### Discussion

"[T]he 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 demonstrate the absence of any material issues of fact," (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made does the burden shift and the opposing party must set forth evidentiary proof in admissible form, establishing the existence of a material issue of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal", (*Egan v Hom*, 74 AD3d 1133, 1134 [2d Dept 2010]; *Petrone v Fernandez*, 12 NY3d 546, 550 [2009]). Thus, "[t]o recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog

had vicious propensities and that the owner of the dog ... knew or should have known of such propensities", (*Collier v Zambito*, 1 NY3d 444, 446 [2004]; *Petrone v Fernandez*, 12 NY3d at 550 [2009]; *Palumbo v Nikirk*, 59 AD3d 691, 691 [2d Dept 2009]; *Roche v Bryant*, 81 AD3d 707 [2d Dept 2011]; *Ayres v Martinez*, 74 AD3d 1002 [2d Dept 2010]).

Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others, (*Collier v. Zambito*, 1 NY3d @ 446 [2004]; *Dickson v. McCoy*, 39 NY 400, 403 [1868]; *Claps v Animal Haven, Inc.*, 34 AD3d 715, 716 [2d Dept 2006]). "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", (*Hodgson–Romain v Hunter*, 72 AD3d 741, 741 [2d Dept 2010]; *Bard v Jahnke*, 6 NY3d 592, 597 [2006]; *Velez v Andrejka*, 126 AD3d 685 [2d Dept 2015]).

Here, the defendants testified that they have never had any issues with Rollie in the past. Eshwarie Rahaman, Ashlee Rahaman's mother, testified that Rollie had never growled at anyone, other than family when they played with him and he never bared his teeth at anyone that she knows of. Mrs. Rahaman further testified that the plaintiff was sitting in the kitchen and patting Rollie throughout the day.

Ashlee Rahaman testified that she had never seen Rollie go after anyone and had never seen Rollie growl at anyone who came to the house. Sheik H. Rahaman testified that, prior to December 2, 2017, Rollie never bit anyone, never jumped or leapt at someone, or never bared his teeth at anyone. The plaintiff, Victoria Mohammed, testified that Ashlee offered to put the dog away and Victoria agreed for her to leave the dog out. Ashlee told her that she would hold on to Rollie and let him sniff her and if he barked, she

would put hm away. He sniffed the plaintiff and she pet him and he did not bark at her.

Based on the testimony provided, the Court finds that the defendants have established that they had no prior notice of the dog's having vicious propensities and have made out a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, (*Alvarez* , 68 N.Y.2d at 324). The burden now shifts to the plaintiff to show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of her position.

The plaintiff argues that the defendants put Rollie in a room when people came to the house, that they had a "Beware of Dog" sign and that pit bulls are known to be vicious dogs with a propensity to attack and that they are banned in many places and jurisdictions. However, the Court finds that none of these arguments create any issues of fact in this particular case. Rollie had never attacked any person up to that time and did not growl at people nor bare his teeth. In fact, the plaintiff testified that, on the day of the incident, he sniffed her and she pet him. She had been at the defendants house for hours with Rollie in the kitchen with them without incident.

While, the dog being restrained and the manner in which the dog is restrained, may create an issue of fact, here, the defendants obviously did not always restrain Rollie since, he was not restrained the entire time the plaintiff was at the defendants' house on the day of the incident, with the plaintiff interacting with the dog. Additionally, the Court of Appeals has stated that a particular breed is not to be considered dangerous (*Bard v Jahnke*, 6 NY3d 592, 599 [2006]). The presence f a "Beware of Dog" sign, the breed of dog and testimony that the dog was sometimes put away in a room, "is insufficient to raise a triable issue of fact as to the dog's vicious propensities in the absence of any evidence that prior

to this incident the dog exhibited any fierce or hostile tendencies” (*Palumbo v Nikirk*, 59 AD3d 691 [2d Dept 2009]).

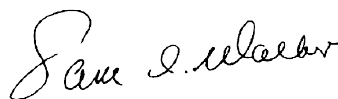
Accordingly, it is

ORDERED that the defendants’ motion for summary judgment is granted; and it is further

ORDERED that the action is dismissed against the defendants, Sheik H. Rahaman, Eshwarie Rahaman, and Ashlee Rahaman.

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

Dated: White Plains, New York  
March 30, 2020



---

HON. SAM D. WALKER, J.S.C.