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| <b>Capone v Durchhalter</b>                                                                                                                                                                                                    |
| 2023 NY Slip Op 35169(U)                                                                                                                                                                                                       |
| June 8, 2023                                                                                                                                                                                                                   |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 709237/2020                                                                                                                                                                                           |
| Judge: Phillip Hom                                                                                                                                                                                                             |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**SUPREME COURT OF THE STATE OF NEW YORK  
QUEENS COUNTY**

PRESENT: HON. PHILLIP HOM

PART 14

*Justice*

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SCOTT CAPONE,

INDEX NO. 709237/2020MOTION DATE 02/23/2023

Plaintiff,

MOTION SEQ. NO. 001

- v -

VICTOR DURCHHALTER, WALTER DURCHHALTER, and  
MARION DURCHHALTER

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38

were read on this motion to/for

SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that Defendants' motion for summary judgment is determined as follows:

Plaintiff Scott Capone ("Plaintiff") commenced this action against Walter Durchhalter ("Walter") and Marion Durchhalter ("Marion") (collectively "Defendants") to recover for injuries sustained in a dog bite incident on December 21, 2017, at 723 Shad Creek Road, Broad Channel, NY 11693 ("Premises").

Defendants move for summary judgment, dismissing the complaint. Plaintiff opposes.

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

In order to recover for injuries caused by a dog bite under strict liability, the plaintiff must establish that the dog had vicious propensities of which the owner knew or should have known about (*see Collier v Zambito*, 1 NY3d 444, 446 [2004]; *Bukhtiyarova v Cohen*, 172 AD3d 1153, 1154 [2d Dept 2019]; *Jacobsen v Schwarz*, 50 AD3d 964, 965 [2d Dept 2008]). "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" (*Bukhtiyarova*, 172 AD3d at 1154, quoting *Collier*, 1 NY3d at 446; *see Costanza v Scarlata*, 188 AD3d 1145, 1146 [2d Dept 2020]). An owner's knowledge

of vicious propensities may be established by proof of similar prior acts of which the owner had notice (*see Collier*, 1 NY3d at 446.). “It is not necessary to prove a prior bite” (*Jacobsen*, 50 AD3d at 965).

“[A] triable issue of fact as to knowledge of a dog’s vicious propensities might be raised—even in the absence of proof that the dog had actually bitten someone—by evidence that it had been known to growl, snap or bare its teeth [. . .] whether the owner chose to restrain the dog, and the manner in which the dog was restrained [. . .] or [t]he keeping of a dog as a guard dog” (*Collier*, 1 NY3d at 447). An animal may be found to have vicious propensities where its behavior, although not dangerous or ferocious, reflects a proclivity to act in a way that puts others at risk of harm where such proclivity results in the injury giving rise to the lawsuit (*Id.*).

In support, Defendants submit, among other things, the transcript of Plaintiff’s examination before trial (“EBT”) (EF Doc 25) and Marion’s EBT transcript (EF Doc 26).

*Plaintiff’s EBT testimony*

Plaintiff testified that in 2017, he worked for Renewal by Andersen and was dispatched to the Premises to conduct a window sales presentation. Plaintiff testified that he did not recall Defendants’ names but described Defendants as husband and wife. Plaintiff testified that Defendants’ daughter was present and that the daughter’s fiancé arrived during the presentation, but Plaintiff did not interact with them, only Defendants. Plaintiff stated that Defendants had a Jack Russell Terrier that barked and jumped and “[pounded] at the door” when Plaintiff entered the Premises.

Plaintiff testified that the dog was approximately two to three feet in length and “came up to [Plaintiff’s] shin.” Plaintiff stated that he has owned dogs all his life and is not afraid of dogs. Plaintiff testified that Defendants had to restrain the dog in order to allow Plaintiff to enter the Premises. Plaintiff stated that, upon his entry into the Premises, the dog bared its teeth at Plaintiff and was growling, barking, and lunging. Plaintiff testified that, “[Defendants] had to physically restrain the dog and they had difficulty restraining the dog because the dog was going crazy.”

Plaintiff described the room in which he and Defendants sat as huge and open concept, encompassing a living room, dining room, and kitchen.

Plaintiff testified that, after approximately twenty minutes of Defendants attempting to restrain the dog, Plaintiff was able to begin his sales presentation. Plaintiff testified that Defendants did not put a leash on the dog or put the dog in a crate or another room but required their daughter to sit with the dog at the opposite side of the room and restrain it by holding the dog’s collar and wrapping her arm around the dog’s stomach. Plaintiff stated that, even after separating the dog from Plaintiff, it was growling, barking, and lunging.

Plaintiff testified that, during his presentation, he got up from his chair to grab tools from his work bag and the dog escaped from the daughter’s grip, ran approximately twenty-five to thirty feet toward Plaintiff while barking and bit Plaintiff’s left ankle. Plaintiff stated that the dog did not immediately release its bite but held on for a few seconds. Plaintiff testified that the dog bite

cut through his pants and socks. Plaintiff testified that Defendants removed the dog from the room after the bite.

Plaintiff testified that Marion apologized and informed Plaintiff that the dog was a rescue and had been abused. Plaintiff stated that he bled profusely and required gauze and a towel to stop the bleeding. Plaintiff testified that Defendants purchased windows from him, which required Plaintiff to return to the Premises within the following day or two, with a professional measurer to complete the sale. Plaintiff stated that, upon returning to the Premises, Marion informed him that the dog had been put away and would not bother Plaintiff. Plaintiff testified that he asked Defendants whether the dog had ever bitten anyone before and Marion responded that she did not know.

*Marion's EBT testimony*

Marion testified that Walter is her son. She stated that, at the time of the incident, she owned two dogs. Marion stated that the dog involved in the incident is named Thelma and, at the time of the incident, Thelma was four years old. Marion testified that she obtained Thelma sometime between February and April of 2017 from the Key West ASPCA in Florida. Marion testified that no one at the ASPCA informed her that Thelma had been abused. Marion testified that her husband, Victor Durchhalter ("Victor") passed away on October 4, 2019.

Marion testified that at the time of the accident, the following people were present in her home: Plaintiff; Marion; Victor; Marion's granddaughter, Nicolette; Nicolette's fiancé, Sean; and Marion's grandson, Craig.

Marion testified that, on the day of the accident, one of the dogs barked when the doorbell rang, but she could not recall which one. Marion further testified that Thelma may have jumped up on Plaintiff when he entered the Premises. Marion testified that Thelma did not bare her teeth or lunge at Plaintiff. Marion stated that both dogs were present in the living room with Nicolette and Sean while Plaintiff and Marion sat in the dining room. Marion stated that neither Nicolette or Sean were next to Thelma. Marion testified that she did not hear Thelma bark or growl at Plaintiff when he sat down.

Marion testified that the bite occurred as Plaintiff was leaving the Premises. Marion describes the events as follows: Plaintiff was holding his window sample case as he passed the chair in which Thelma was sitting. Marion testified that Plaintiff paused as he passed Thelma's chair and turned, brushing the sample case against Thelma and causing her to jump down. Marion stated that Thelma nipped at Plaintiff and that there was no broken skin. Marion stated that she did not know if anyone was holding Thelma at any time. Marion testified that Thelma's bite was very fast and Thelma didn't hold on for long. Marion stated that she treated Plaintiff with hydrogen peroxide and bacitracin, but there was no puncture.

Marion testified that she never knew of Thelma having bitten any person or animal in the past. Marion stated that Thelma had never growled, bared her teeth, or lunged at anyone and Marion never had to restrain her. Marion testified that no one else witnessed the dog bite.

As a preliminary matter, the Court notes that Plaintiff commenced this action on July 3, 2020, approximately nine months after Defendant Victor passed away. As such, this matter is a legal nullity as against Victor and same is discontinued as against him (*see Federal Natl Mtge. Assoc. v Tudor*, 185 AD3d 905, 906 [2d Dept 2020]).

The Court finds Defendants fail to establish prima facie entitlement to summary judgment as against Marion as Plaintiff's testimony, submitted by Defendants, fails to eliminate all triable issues of fact as to whether Thelma exhibited vicious propensities, i.e., whether Thelma growled, lunged, and pounded at the door; however, the Court finds Defendants establish prima facie entitlement to judgment as a matter of law as against Walter as neither Plaintiff nor Defendant state that Walter owned the dog or was present at the time of the incident. Marion merely states that Walter occasionally resides at the Premises and Plaintiff, at his EBT, described Defendants as husband and wife and did not mention Walter's presence at the Premises.

Therefore, it is incumbent upon Plaintiff to raise a triable issue of fact as to Walter's liability in the matter.

In opposition, Plaintiff submits, among other things, Plaintiff's affidavit (EF Doc 30). Plaintiff fails to raise a triable issue of fact as to Walter's liability. As such, Defendants' motion is granted as to Walter.

In accordance with the foregoing, it is hereby **ORDERED** that Defendants' motion is granted in part and denied in part; and it is further

**ORDERED** that Defendants' motion is denied as to Defendant Marion Durchhalter; and it is further

**ORDERED** that Defendants' motion for summary judgment is granted as to Defendants Walter Durchhalter and Victor Durchhalter; and it is further

**ORDERED** the complaint is dismissed as against Walter Durchhalter and Victor Durchhalter; and it is further

**ORDERED** that the caption is amended as follows:

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SCOTT CAPONE,

Plaintiff,

- v -

MARION DURCHHALTER

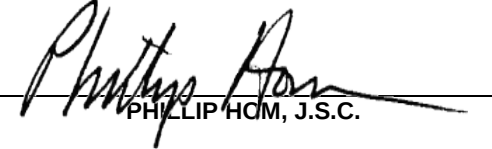
Defendants.

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and it is further

**ORDERED** that Plaintiff shall serve a copy of this Order with Notice of Entry upon Defendants within twenty (20) days of entry of this order.

This constitutes the Decision and Order of the Court.

|                       |                          |                                                                                    |                                                                                    |
|-----------------------|--------------------------|------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| <u>6/8/2023</u>       |                          |  |                                                                                    |
| DATE                  |                          | PHILLIP HOM, J.S.C.                                                                |                                                                                    |
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED                                                                      | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION                          |
|                       | <input type="checkbox"/> | GRANTED <input type="checkbox"/> DENIED                                            | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER                                                                       | <input type="checkbox"/> SUBMIT ORDER                                              |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN                                                         | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE  |

**FILED & RECORDED**

6/9/2023

8:57 AM 

COUNTY CLERK  
QUEENS COUNTY