

<b>Valentino v Byron-Lockwood</b>
2024 NY Slip Op 35043(U)
March 27, 2024
Supreme Court, Sullivan County
Docket Number: Index No. E2022-796
Judge: James R. Farrell
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF SULLIVAN

GUY VALENTINO,

Plaintiff,

-against-

ROBERTA BYRON-LOCKWOOD, HERB CLARK,  
and SULLIVAN COUNTY VISITORS ASSOCIATION,  
INC.,

Defendants.

**DECISION AND ORDER**

Index No.: E2022-796

Motion Seq. 2 and 3

**FARRELL, J.**

The following papers numbered 1 to 13 were read on the motions for summary judgment filed by Defendant Sullivan County Visitors Association, Inc. (Motion Seq. 2) and Defendants Robert Byron-Lockwood and Herb Clark (Motion Seq. 3):

<u>PAPERS</u>	<u>NUMBERED</u>
SCVA Notice of Motion, Statement of Material Facts, Affirmation in Support, Exhibits A-B (Motion Seq. 2)	1-4
Byron-Lockwood/Clark Notice of Motion, Statement of Material Facts, Affirmation in Support, Exhibits A-G (Motion Seq. 3)	5-8
Response to Statement of Material Facts; Affirmation in Opposition (Motion Seq. 2)	9-10
Response to Statement of Material Facts; Affirmation in Opposition (Motion Seq. 3)	11-12
Reply Affirmation (Motion Seq. 3)	13

**Background and Procedural History**

This is an action for personal injuries allegedly sustained by plaintiff, Guy Valentino, on May 9, 2021 as the result of a dog bite by a dog owned by defendants Roberta Byron-Lockwood and Herb Clark (collectively referred to as “defendants”). The bite occurred in Defendant Sullivan County Visitors Association’s (“SCVA”) office located at 15 Sullivan Avenue, Unit 1, in the Village of Liberty. Defendant Byron-Lockwood and Defendant Clark are a married couple

and were the President and Vice President of SCVA, respectively at the time of the alleged bite. Plaintiff commenced this action by filing a summons and verified complaint on May 16, 2022. Issue was joined on July 7, 2022 by the filing of SCVA and Defendants' verified answers. Following the completion of discovery, a note of issue was filed on November 16, 2023. SCVA and Defendants now move for summary judgment.

### **Instant Motion**

Defendants owned an Australian Shepard named Murphy for approximately seven years.<sup>1</sup> Defendants began bringing Murphy to work with them at SCVA's office in January 2021. Plaintiff operates a business which installs security cameras. On March 9, 2021, plaintiff went to SCVA to give an appraisal for installation of security cameras. When plaintiff met with Defendant Herb Clark and non-party James Hopkins, the dog was also present. Plaintiff recalled that he introduced himself to the dog and pet him. Plaintiff testified that the dog accompanied plaintiff, Defendant Clark and Mr. Hopkins as they walked around the office space. Plaintiff testified that the dog was "very friendly" and walked along side him as they walked around. Plaintiff further testified that neither Defendant Clark nor Mr. Hopkins gave any warning to plaintiff that the dog was "vicious or might bite" or "to stay away from the dog." Plaintiff testified that prior to the bite, the dog did not bark or growl. Plaintiff testified that Defendant Clark indicated that they were going outside to continue the tour for the appraisal. Plaintiff testified that the dog became excited at hearing they were going outside. Defendant Clark then told the dog that he (the dog) needed to stay inside. Plaintiff testified that as the dog walked back toward Defendant Clark, plaintiff kneeled down, put his hand out toward the dog and said "no don't worry, we'll be right back." Plaintiff testified that without warning, no bark or growl, the dog snapped at him, biting his lip and finger. Plaintiff further testified that, from his

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<sup>1</sup> Murphy died in March of 2022.

experience with dogs, he did not think the dog was upset with plaintiff but “upset at the situation.”

Defendant Clark testified that he and Defendant Byron-Lockwood had separate offices that were across from each other, and that a hallway ran between their offices. He testified that when plaintiff arrived at SCVA, the dog greeted plaintiff and plaintiff pet him. Defendant Clark testified that just prior to the bite, plaintiff and Mr. Hopkins were standing in the hallway outside of Defendant Clark and Defendant Byron-Lockwood’s offices. Defendant Clark was standing in Defendant Byron-Lockwood’s doorway and directed the dog, which was still in the hallway, to enter Defendant Byron-Lockwood’s office because they were going to go outside. Defendant Clark testified that the dog entered Defendant Byron-Lockwood’s office and turned around facing out, such that Defendant Clark was standing between the dog and plaintiff. Defendant Clark testified that plaintiff kneeled down, reached his arm around defendant’s legs, and got into the dog’s face, startling the dog, and the dog snapped at plaintiff. Defendant Clark testified that the dog did not growl. He did not see the dog bite plaintiff but realized plaintiff had been bitten when he stood up. Defendant Clark testified that immediately after the bite, the dog let go, appeared scared, and retreated toward Defendant Byron-Lockwood. Defendant Clark testified that the dog was friendly and loving; played well with his grandchildren, and that he was “great” around strangers. He further testified that the dog had never bitten anyone, snapped at anyone, nor jumped on anyone (other than affectionately).

James Hopkins works for EEA Security Services Community Training Center, which is another tenant located at 15 Sullivan Avenue. He testified that Defendant Clark spoke to him about installing security cameras and that he (Mr. Hopkins) knew of someone who did that line of work. Mr. Hopkins testified that he brought plaintiff to SCVA to meet with Defendant Clark

about providing an estimate for the security camera work. Mr. Hopkins testified that he was aware that defendants had a dog in their offices, having seen Defendant Clark walk the dog in and out of the building. He testified that he had also observed the dog barking at the window on occasion. Mr. Hopkins observed plaintiff kneel down to pet the dog, at which time “the dog lunged at him” and bit him. Mr. Hopkins testified that at some point after the dog bit the plaintiff, Defendant Clark stated to Mr. Hopkins that the dog had bitten before. Although he could not be certain, Mr. Hopkins testified that, to the best of his recollection, Defendant Clark stated that the dog had bitten him (Defendant Clark). He further testified that prior to this incident, he was not aware of any instances when the dog jumped or lunged at anyone.<sup>2</sup> He further testified that he had not received any complaints about the dog.

SCVA and Defendants both move for summary judgment seeking dismissal of the complaint. SCVA contends that it is not liable to plaintiff because SCVA did not own, control or harbor the dog. Defendants argue that their dog did not have vicious propensities nor did Defendants have notice of any vicious propensities. In opposition to the motion, plaintiff argues that SCVA has failed to establish their burden of proof because SCVA permitted the Defendants to bring the dog with them to work. Plaintiff further argues that an issue of fact has been raised by Mr. Hopkin’s testimony as to whether the dog had vicious propensities and/or whether Defendants were aware of those propensities. In reply, Defendants argue that Mr. Hopkin’s testimony does not create an issue of fact as he could not be certain of what Defendant Clark told him.

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<sup>2</sup> Mr. Hopkins testified to an incident in which the dog “lunged” at him while he was getting his mail. He testified that the dog was leashed, and defendant Clark maintained control of the dog. Mr. Hopkins was not 100% certain whether the incident occurred before or after the bite incident, but to the best of his recollection it occurred after the bite incident.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If a movant has met this threshold burden, to defeat the motion the opposing party must present the existence of a triable issue of fact (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]). In deciding a motion for summary judgment, “the trial court must afford the party opposing the motion every inference which may be properly drawn from the facts presented, and the facts must be considered favorable to the nonmovant” (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]).

“Controlling precedent holds that [t]here is no cause of action in negligence as against the owner of a dog who causes injury, but one may assert a claim in strict liability against a dog owner for harm caused by the dog's vicious propensities when the owner knew or should have known of those propensities” (*Handel v Carey*, 217 AD3d 1222, 1223 [3d Dept 2023] [quotation marks and citation omitted]). Moreover, strict liability for damages arising from harm caused by animal has been extended to a non-owner, who, with knowledge of the animals vicious propensities, harbors the animal, exercises dominion and control over the animal, or permits the animal to be on its premises (*see Dufour v Brown*, 66 AD3d 1217, 1218 [3d Dept 2009]; *see also Matthew H. County of Nassau*, 131 AD3d 135, 144 [2d Dept 2015]).

In the context of a defendant's motion for summary judgment in a dog bite case, the defendant bears an initial burden to demonstrate that, prior to the incident giving rise to the lawsuit, he or she was without knowledge that the animal possessed any vicious or dangerous propensities” (*J.S. by B.S. v Mott*, 217 AD3d 1170, 1171 [3d Dept 2023][citation omitted]). If defendant is not the owner of the dog, they must demonstrate that they did not harbor or have dominion or control over the dog, nor permit the dog to be on their premises (*see Dufour*, 66

AD3d at 1218; *see also Rodriguez v Messenger*, 108 AD2d 1085 [3d Dept 1985]). “If that threshold showing is made, the burden then shifts to the plaintiff to raise a triable question of fact as to whether [the] defendant knew or should have known that [the] dog had vicious propensities” (*Price v Sarasene*, 198 AD3d 1234, 1236 [3d Dept 2021] [quotation marks and citation omitted]). “A vicious propensity in this context need not involve any ferocious or aggressive behavior, but has instead been defined as a proclivity to act in a way that puts others at risk of harm, so long as such proclivity results in the injury giving rise to the lawsuit” (*Clark v Heaps*, 121 AD3d 1384, 1384 [3d Dept 2014][quotation marks and citation omitted]). Factors to be considered in determining whether an owner has knowledge of a dog's vicious propensities include 1) evidence of a prior attack, 2) the dog's tendency to growl, snap, or bare its teeth, 3) the manner of the dog's restraint, 4) whether the animal is kept as a guard dog, and 5) a proclivity to act in a way that puts others at risk of harm, albeit only when such proclivity results in the injury giving rise to the lawsuit (*see Collier v Zambito*, 1 NY3d 444, 446-447 [2004]). “Importantly, however, normal canine behavior does not establish vicious propensities” (*J.S. by B.S. v Mott*, 217 AD3d at 1171 [quotation marks and citation omitted]).

Here, SCVA has failed to establish that it did not harbor, exercise dominion and control over, or otherwise permit the dog onto its premises. Defendants, the owners of Murphy, are the president and vice president of SCVA, respectively; and they chose to bring the dog with them to work at SCVA. Thus, through its president and vice president, SCVA permitted the dog to be in its offices. SCVA's motion does not address whether it did or did not have knowledge of any alleged vicious propensities.

Next, Defendants established their *prima facie* entitlement to judgment as a matter of law that the dog did not have any vicious propensities. However, the testimony of Mr. Hopkins raises

a triable issue of fact as to whether Defendants knew that the dog had vicious propensities. While Mr. Hopkins could not be certain who the dog had bitten (Defendant Clark or some other individual), his testimony indicates that contemporaneously with the bite incident, Defendant Clark stated that the dog had bitten someone before. Viewing the evidence in the light most favorable to plaintiff, the non-moving party, the Court determines that there is an issue of fact as to whether Defendants (and SCVA), knew or should have known that Murphy had vicious propensities based upon an alleged prior bite.

Based upon the foregoing, it is hereby

**ORDERED** that the motion for summary judgment by Defendant Sullivan County Visitors Association, Inc. is denied; and it is further

**ORDERED** that the motion for summary judgment by Defendants Herb Clark and Roberta Byron-Lockwood is denied; and it is further

**ORDERED** that a virtual pre-trial/settlement conference is scheduled for April 11, 2024 at 10:15am. A Microsoft Teams Link will be provided separately.

The foregoing constitutes the Decision and Order of the Court.

Dated: March 27, 2024  
Monticello, NY

ENTER:

  
HON. JAMES R. FARRELL, A.J.S.C.

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.