

2014 WL 3892711

Unreported Disposition

NOTE: THIS OPINION WILL NOT  
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DISPOSITION WILL APPEAR IN A REPORTER.

Supreme Court, Kings County, New York.

Eileen NAPOLITANO, Plaintiff,

v.

Saleh ALSHAEBI d/b/a Boro  
Park Deli Grocery, Defendants.

No. **16549/12**. | Aug. 8, 2014.

#### Attorneys and Law Firms

Van Leer & Greenberg, [Howard B. Greenberg](#), New York  
City, attorneys for plaintiff.

Patterson & Sciarrino, LLP, [Jerome D. Patterson](#), Esq.,  
Bayside, attorney for defendant.

#### Opinion

[FRANCOIS A. RIVERA](#), J.

\*1 By notice of motion filed on February 27, 2014, under motion sequence number two, defendant Saleh Alshaebi (hereinafter Alshaebi) has moved for an order pursuant to [CPLR 3212](#) granting summary judgment in his favor on the issue of liability and dismissing the complaint. By notice of cross motion, filed on March 18, 2014, under motion sequence number three, plaintiff Eileen Napolitano (hereinafter Napolitano) has cross moved for an order pursuant to [CPLR 3212](#) granting summary judgment in her favor on the issue of liability.

#### BACKGROUND

On April 9, 2012, at around 6:00 in the evening, Napolitano was walking her eleven month old miniature schnauzer in Borough Park, a neighborhood in the southwest part of Brooklyn. She entered Boro Park Deli Grocery (hereinafter the deli), a convenience store with a street level entrance on the corner of Utrecht Avenue located at 4928 New Utrecht Avenue, Brooklyn, New York 11219.

At the time, Alshaebi, the owner of the deli and leesee of the space, was alone by the cash register behind the counter. His deli offered sandwiches, cigarettes, newspapers, sodas

and other items typically found in a local neighborhood store. After paying for a newspaper, Napolitano noticed what she described as a large, grey, opossum-like cat emerge from a shelf display of Entenmann's cakes by her feet in front of the counter. As she turned away to leave the store, the cat swatted at her dog. Instinctively, she bent down and scooped up her pet in a protective move. At that point, the ferocious feline<sup>1</sup> attacked her right leg injuring her calf.<sup>2</sup>

Napolitano's complaint consists of forty-three allegations of fact in support of one cause of action for damages for personal injuries. She has alleged that Alshaebi owned or harbored the ferocious feline while he knew or should have known of its vicious propensities. She has also alleged that he violated several health and safety laws, codes and regulations by keeping a cat on a premise where food is being prepared for sale.

#### MOTION PAPERS

Alshaebi's motion papers contain an attorney affirmation and four exhibits, labeled A through D. Exhibit A is a copy of the summons, verified complaint and answer. Exhibit B is a transcript of Napolitano's examination before trial conducted on May 22, 2013. Exhibit C is a transcripts of Alshaebi's examination before trial conducted on November 19, 2013 in which he utilized the services of an Arabic interpreter. Exhibit D is Napolitano's supplemental verified bill of particulars.

Napolitano's opposition papers contain an attorney affirmation and seven exhibits labeled A through G. Exhibit A is a document denominated "Health History of Biting Animal." Exhibit B is Alshaebi's food processing license from New York State's Department of Agriculture and Markets for the deli. Exhibit C is a transcript of Alshaebi's examination before trial conducted on November 19, 2013. Exhibit D and E are Napolitano's verified and supplemental bill of particulars. Exhibit F is an affidavit from Alshaebi pertaining to his lack of ownership of the cat. Exhibit G is another affidavit from Alshaebi pertaining to the lack of existence of a surveillance video.

\*2 Alshaebi replied with an attorney's affirmation.

Napolitano's cross motion contains an attorney affirmation and nine exhibits labeled A through I. Exhibit A is Napolitano's verified complaint. Exhibit B is Alshaebi's verified answer. Exhibit C is Alshaebi's examination before trial conducted on November 19, 2013. Exhibit D is

Alshaebi's lease agreement for the deli. Exhibit E, also labeled as Exhibit B in Napolitano's opposition papers, is a copy of Alshaebi's food processing license issued by New York State's Department of Agriculture and Markets. Exhibit F, also labeled as Exhibit A in Napolitano's opposition papers, is a copy of the document labeled "Health History of Biting Animal." Exhibit G and H are Napolitano's verified bill and supplemental verified bill of particulars. Exhibit I is Napolitano's examination before trial conducted on May 22, 2013.

Alshaebi opposed the cross motion with his attorney's affirmation.

Napolitano replied to Alshaebi's opposition with an affirmation of her counsel and a copy Alshaebi's aforementioned food processing license.

## LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986] ). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Giuffrida v. Citibank*, 100 N.Y.2d 72 [2003] ). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v. Gervasio*, 81 N.Y.2d 923 [1993] ). If a prima facie showing has been made the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d at 324). The prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (*Miller v. Village of E. Hampton*, 98 AD3d 1007 [2nd Dept 2012] citing *Foster v. Herbert Slepoy Corp.*, 76 AD3d 210 [2nd Dept 2010]).

A party opposing a motion for summary judgment is obligated "to lay bear his proofs" to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist (*Friends of Animals, Inc. v. Associated For Manufacturers, Inc.*, 46 N.Y.2d 1065 [1979] ). A genuine issue of fact may not be demonstrated by using mere conclusions, expressions of hope or unsubstantiated allegations or assertions (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525 [1991] ).

When harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier v. Zambito*, 1 NY3d 444 at 446 [2004], that is, the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities (*Egan v. Hom*, 74 AD3d 1133–1134 [2nd Dept 2010] ).

\*3 "For at least 188 years the law of this state has been that the owner of a domestic animal who either, knows or should have known, of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities (see *Collier v. Zambito*, 1 NY3d at 446 [2004] citing *Hosmer v. Carney*, 228 N.Y. 73, 75 [1920]; see also *Restatement [Second] of Torts* § 509). 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 NY3d at 446 [2004] citing *Dickson v. McCoy*, 39 N.Y. 400, 403 [1868] ). Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice (*Collier v. Zambito*, 1 NY3d at 446 [2004] citing *Benoit v. Troy & Lansingburgh R.R. Co.*, 154 N.Y. 223, 225 [1897] ). Evidence tending to demonstrate an animal's vicious propensities may include a prior attack, a tendency to growl, snap, or bare its teeth, the manner in which the animal was restrained, the fact that the animal was kept to guard the premises, and a proclivity to act in a way that puts others at risk of harm (see *Bard v. Jahnke*, 6 NY3d 592 [2006] ).

New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal (see *Egan v. Hom*, 74 AD3d 1133 [2nd Dept 2010]; *Petrone v. Fernandez*, 12 NY3d 540 [2009] ).

### *Alshaebi's Motion for Summary Judgment*

The two requirements for a plaintiff to succeed under strict liability are to establish that the animal had vicious propensities and the animal's owner, or the party in control of the premises, knew or should have known of such propensities (see *Collier v. Zambito*, 1 NY3d at 446 [2004] ).

Therefore, for Alshaebi to be entitled to summary judgment dismissing the case, he must establish that as the animal owner, or person in charge of the premises, he did not have actual or constructive knowledge of the cat's vicious propensities prior to the incident (see *Christian v. Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 [2nd Dept 2008];

see also *Galgano v. Town of N. Hempstead*, 41 AD3d 536 [2nd Dept 2007] ).

Alshaebi testified at his deposition that he did not own, harbor, or ever see the cat prior to the incident of April 9, 2012. By swearing to these facts, Alshaebi met his burden to show that he did not own or harbor the cat and that he had no actual or constructive knowledge of the cat's vicious propensities. As a result, Alshaebi shifted the burden to Napolitano to raise a triable issue of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320–324 [1986] ).

Napolitano's burden was to raise a triable issue of fact as to whether Alshaebi knew or should have known about the cat's vicious propensities (see *Bard v. Jahnke*, 6 NY3d 592 [2006]; see also *Christian v. Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 [2nd Dept 2008] ). In an effort to meet this burden, Napolitano relied on a document denominated “Health History of Biting Animal.” Napolitano also relied on Alshaebi's admission in his deposition testimony that the document was filled out at his direction ten days after the incident. The document contained a handwritten entry which stated that the cat “came with the store.” Napolitano contended that the handwritten entry raised a triable issue of fact as to whether Alshaebi was keeping the cat at his deli prior to the date of her injury. She further contended that it raised a triable issue of fact regarding Alshaebi's credibility.

\*4 Although Napolitano may have arguably raised an issue of fact regarding whether Alshaebi harbored the cat, she did not raise a triable issue of fact regarding whether the cat had vicious propensities. In fact, she offered no evidence demonstrating that the cat exhibited a proclivity to act in a way that puts others at risk of harm (see *Bard v. Jahnke*, 6 NY3d 592 [2006] ). Moreover, Napolitano admitted that she had no knowledge of the cat's behavior or history prior to her injury. Therefore, Napolitano fails to raise a triable issue of fact as to Alshaebi's knowledge of the cat's vicious propensities.

Napolitano also asserted that Alshaebi violated several health and safety codes and regulations which prohibit an establishment from keeping an animal in a place where food is prepared. A violation of New York State statutes setting forth a standard of care is per se negligence (*Barbieri v. Vokoun*, 72 AD3d 853 [2nd Dept 2010] ) whereas a violation

of municipal laws and regulations may only serve as some proof of negligence (see eg. *Dowd v. City of New York*, 40 AD3d 908 [2nd Dept 2007] ).

However, since New York does not recognize common-law negligence as a cause of action for injuries caused by a domestic animal (see *Egan v. Hom*, 74 AD3d 1133 [2nd Dept 2010] ), the issue of whether Alshaebi violated a New York State statute or a municipal codes or regulation is not relevant or useful in determining fault under a strict liability analysis. Consequently, Napolitano did not raise a triable issue of fact.

#### *Napolitano's Motion for Summary Judgment*

Napolitano made a cross-motion pursuant to CPLR 3212 for an order granting summary judgment in her favor on the issue of liability. In order to recover in strict liability Napolitano was required to prove that the cat had vicious propensities and that Alshaebi, as the animal's owner or the party in control of the premises, knew or should have known of such propensities (see *Collier v. Zambito*, 1 NY3d 444 at 446 [2004]; see also *Claps v. Animal Haven Inc.*, 34 AD3d 715, 716 [2nd Dept 2006] ). As previously discussed, Napolitano did not establish that the cat had vicious propensities and that Alshaebi knew or should have known about the cat's vicious propensities. Consequently, she did not prove her entitlement to summary judgment in her favor regardless of the sufficiency of Alshaebi's opposition papers (*Winegrad v. NYU Medical Center*, 64 N.Y.2d 851 [1985] ).

#### CONCLUSION

Alshaebi's motion for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability and dismissing the complaint is granted.

Napolitano's cross motion for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability is denied.

The foregoing constitutes the decision and order of this Court.

#### Parallel Citations

2014 N.Y. Slip Op. 51197(U)

Footnotes

- 1 The court adopted the cat's description from Napolitano's opposition papers.
- 2 The background is derived from plaintiff's complaint, bill of particulars and deposition testimony. It is presented for context and not as findings of fact.

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