IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Holli A. Berger, Plaintiff, v. Arkadiusz P. Kalita, WAVE218, LLC, an Illinois Series LLC, an Illinois corporation, Krsihnan Saranathan, and Pawel Czechowicz, Defendants.	)	No. 18 L 12157

MEMORANDUM OPINION AND ORDER

The Animal Control Act authorizes a cause of action against any person who keeps or harbors a dog that injures another person. A negligence theory will also lie against a dog owner if the owner had prior knowledge of the dog's vicious propensities. The record shows that neither defendant kept or harbored the dog that caused the plaintiff's injuries or knew of the dog's vicious propensities. For these reasons, the defendants' summary judgment motions must be granted.

Facts

On May 29, 2017, Holli Berger was walking her dog, Gemma, on the sidewalk near 218 Waverley Lane in Schaumburg when a dog, Sunia, attacked and injured both Berger and Gemma. On November 11, 2018, Berger filed a complaint against various defendants for her injuries and property damage. On June 17, 2019, Berger filed her current, second amended complaint.

Berger's current complaint contains seven counts. Count 1 is brought against Arkadiusz Kalita under the Animal Control Act

(ACA), *see* 510 ILCS 5/1 – 35, as Sunia's owner and as a resident of 218 Waverley Lane.[1] Count 3 is brought against WAVE218, LLC and Krsihnan Saranathan (together, "Saranathan") under the statute as the owners of the house in which Kalita and Sunia lived. Count 5 is brought against Czechowicz under the statute as someone who also lived at 218 Waverley Lane.

Berger's ACA causes of action rest on two provisions stating, in part:

> "Owner" means any person having a right of property in an animal, or who keeps or harbors an animal, or who has it in his care, or acts as its custodian, or who knowingly permits a dog to remain on any premises occupied by him or her.
>
> If a dog or other animal, without provocation, attacks, attempts to attack, or injures any person who is peaceably conducting himself or herself in any place where he or she may lawfully be, the owner of such dog or other animal is liable in civil damages to such person for the full amount of the injury proximately caused thereby.

510 ILCS 5/2.16 & 5/16.

Counts 2, 4, and 6 are negligence causes of action. Count 2 is directed against Kalita and alleges that in 2015, Sunia bit another person. Berger claims Kalita was negligent in this instance by failing to: (1) muzzle Sunia; (2) secure the dog behind a gate with a lock; (3) prevent Sunia from running at large; (4) contain Sunia on the property; and (5) restrain Sunia. Count 4 is directed against WAVE218 and Saranathan and claims that they failed to: (1) secure the gate with a lock knowing of Sunia's prior attack; (2) prevent Sunia from running at large; (3) contain Sunia on the property; (4) restrain Sunia; (5) provide sufficient means to

[1] Kalita has not appeared and is in default.

secure the gate; and (6) repair the fence and gate. Count 6 is directed against Czechowicz and raises the same claims as against Kalita.

Count 7 is a cause of action for property damage against all defendants based on a negligence theory. Berger alleges that Czechowicz and Saranathan's acts and omissions injured her property, Gemma. Berger seeks recovery for the medical bills she paid for Gemma's care and treatment following Sunia's attack.

The parties deposed various witnesses during discovery, three of whom provided facts relevant to the parties' summary judgment motions. Saranathan testified he is the sole owner of WAVE218 and he leased the house at 218 Waverley Lane exclusively to Czechowicz. When Saranathan inspected the property, Kalita was in the house, but Saranathan assumed Kalita was Czechowicz's business partner. Saranathan did not know Kalita lived in the house. The tenancy agreement authorized Saranathan to allow additional tenants, but he never agreed to allow Kalita to live in the house.

Saranathan testified that the lease prohibited pets except with his approval, and he never authorized any dog to live at 218 Waverley Lane. He did not know Sunia lived at the house and learned only after the incident that Kalita owned Sunia. When Saranathan inspected the house, he did not see any evidence a dog lived there. When he lived in the house in or around 2006, he installed the fence around the yard. He never had a problem with the fence and Czechowicz never complained about it. Saranathan knew of no condition preventing the gates from closing properly. The gates' latches had never been repaired or replaced, and it would have been the tenant's responsibility to do so.

Czechowicz testified that he leased and moved into 218 Waverley Lane in the summer of 2015. Kalita was present when Czechowicz and Saranathan signed the lease and Saranathan knew Kalita would be living in the house as well as Sunia. Kalita was not on the lease because of his poor credit score; nonetheless,

he paid half the rent. Kalita and Sunia moved in at the same time. Czechowicz acknowledged the lease provision making the landlord responsible for major maintenance and repairs and believed that included any problems with the gates or latches. Czechowicz did not provide care for Sunia or control the dog. Sunia lived in the basement, and the dog's food and toys were kept there. He did not know of Sunia's prior vicious tendencies. Czechowicz was out of town on vacation on May 29, 2017.

Kristen Smoot, who lives across the street from 218 Waverley Lane testified that she went to the scene of the dog attack. She said that she heard from two neighbors who live next door to 218 Waverley Lane that Sunia got out through the fence. Also, a postal delivery worker told Smoot that Sunia once bit and tore his pants leg and that other delivery workers would not deliver mail to that house.

Berger testified a neighbor told Berger that the dog's owner had complained to the landlord about the yard gate not operating properly and that it needed to be repaired. An animal control officer also told Berger that the dog's owner had complained to the landowner. Berger personally inspected the fence and gate in passing as she drove by the residence. She saw that the fence and gate did not line up and was "off-alignment" when closed and it appeared that the gate would not latch.

The record contains the lease agreement signed by Saranathan and Czechowicz. The lease explicitly provides that: "TENANT shall make all necessary repairs to the Premises, at TENANT's expense, whenever damage has occurred or repairs are required due to TENANT's conduct or neglect." The same paragraph further states: "Major maintenance and repair of the Premises, not due to TENANT's misuse, waste or neglect, shall be the responsibility of LANDLORD."

The record also contains a police report created by the Schaumburg Police Department on May 30, 2017, the day after the incident. The report states that Sunia got out of the yard

because the gate was open. The report also states that on December 12, 2015, Sunia bit a woman while at 218 Waverley Lane.

WAVE218 and Saranathan filed a summary judgment motion as to counts 3, 4, and 7. Czechowicz filed his own summary judgment motion as to counts 5, 6, and 7. Berger filed a joint response to both motions. The defendants filed separate reply briefs.

Analysis

The Code of Civil Procedure authorizes the issuance of summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005. The purpose of summary judgment is not to try a question of fact, but to determine whether one exists that would preclude the entry of judgment as a matter of law. *See Land v. Board of Ed. of the City of Chicago*, 202 Ill.2d 414, 421, 432 (2002). A defendant may disprove a plaintiff's case in one of two ways. First, the defendant may introduce affirmative evidence that, if uncontroverted, would entitle the defendant to judgment as a matter of law; this is the so-called "traditional test." *See Purtill v. Hess*, 111 Ill. 2d 229, 240-41 (1986). Second, the defendant may establish that the plaintiff lacks sufficient evidence to establish an element essential to a cause of action; this is the so-called "*Celotex* test." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986), *followed Argueta v. Krivickas*, 2011 IL App (1st) 102166, ¶ 6. A court should grant summary judgment on a *Celotex*-style motion only when the record indicates that the plaintiff had extensive opportunities to establish his or her case but failed in any way to demonstrate that he or she could do so. *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

Regardless of the approach, if the defendant presents facts that, if not contradicted, are sufficient to support summary

judgment as a matter of law, the nonmoving party cannot rest on the complaint and other pleadings to create a genuine issue of material fact. *See Harrison v. Hardin Cnty. Cmty. Unit Sch. Dist. No. 1*, 197 Ill. 2d 466, 470 (2001). Rather, a plaintiff creates a genuine issue of material fact only by presenting enough evidence to support each essential element of a cause of action that would arguably entitle the plaintiff to judgment. *Prostran v. City of Chicago*, 349 Ill. App. 3d 81, 85 (1st Dist. 2004). To determine whether a genuine issue as to any material fact exists, a court is to construe the pleadings, depositions, admissions, and affidavits strictly against the moving party and liberally in favor of the opponent. *See Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32, 43 (2004). The inferences drawn in favor of the nonmovant must, however, be supported by the evidence. *Destiny Health, Inc. v. Connecticut Gen'l Life Ins. Co.*, 2015 IL App (1st) 142530, ¶ 20. A triable issue precluding summary judgment exists if the material facts are disputed, or if the material facts are undisputed but a reasonable person might draw different inferences from the undisputed facts. *Id.* On the other hand, if no genuine issue of material fact exists, a court has no discretion and must grant summary judgment as a matter of law. *See First State Ins. Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851, 854-55 (1st Dist. 1994).

I. ACA Causes of Action – Counts 3 and 5

To prevail on an ACA claim, "a plaintiff must prove the following: (1) an injury caused by an animal owned by the defendant; (2) lack of provocation; (3) the peaceable conduct of the injured person; and (4) the presence of the injured person in a place where he has a legal right to be." *Kindel v. Tennis*, 409 Ill. App. 3d 1138, 1140 (5th Dist. 2011). The statute's "overriding purpose" is to protect the public; consequently, "the Act imposes penalties against both the owner of the animal and anyone 'who places himself in a position of control akin to an owner.'" *Beggs v. Griffith*, 393 Ill. App. 3d 1050, 1054 (5th Dist. 2009) (quoting *Wilcoxen v. Paige*, 174 Ill. App. 3d 541, 543 (3d Dist. 1988)). By mandating liability, the ACA provides an economic incentive for

owners to keep their animals from harming other persons. *Wilcoxen*, 174 Ill. App. 3d at 543.

The parties do not dispute that neither Berger nor Gemma provoked Sunia's attack, that Berger was peaceably taking Gemma for a walk at the time of the attack, and that she and Gemma were lawfully on the sidewalk. Thus, the only contested issue is whether Saranathan, and Czechowicz "owned" Sunia within the meaning of the statute. The answer begins with *Steinberg v. Petta*, in which the Supreme Court interpreted the "harbors or keeps" phrase as requiring "some measure of care, custody, [and] control." 114 Ill. 2d 496, 501 (1986). In *Steinberg*, the court reversed a trial court's finding that an absentee landlord harbored the tenant's dog. *Id.* The court reasoned that knowingly permitting a dog to be on rented property is insufficient to establish ownership since the ACA requires evidence of the defendant's care, custody, and control of the animal. *Id.* at 502. Illinois courts have consistently followed this conclusion. *See Cieslewicz v. Forest Preserve Dist.*, 2012 IL App (1st) 100801, ¶ 13 (citing cases); *Howle v. Aqua Ill., Inc.*, 2012 IL App (4th) 120207, ¶¶ 44-47.

Czechowicz testified that Saranathan knew when they signed the lease that Kalita and Sunia would be living in the house. Saranathan's testimony disputes that fact. Even if it were true, under *Steinberg*, such knowledge does not establish or permit an inference that Saranathan also cared for or had custody or control of Sunia. Further, even if it could be inferred that Saranathan's subsequent inspections should have or did put him on notice that Sunia lived at the property would, once again, not permit the additional inference that Saranathan cared for or had custody or control of Sunia.

The facts are different for Czechowicz, but the result is the same. It is uncontested that Czechowicz was out of town on vacation on May 29, 2017. It is also uncontested that Czechowicz did not provide any care for or have any control over Sunia. And

even if he did, Czechowicz certainly did not do so when he was out of town on vacation.

In sum, there exists a lack of evidence that Saranathan or Czechowicz harbored or kept Sunia within the meaning of the ACA. Their knowledge or presumed knowledge that Sunia lived at 218 Waverley Lane is insufficient to meet the ACA's ownership definition. Both motions for summary judgment must, therefore, be granted and counts 3 and 5 dismissed with prejudice.

II. Negligence Causes of Action – Counts 4 and 6

The defendants also argue that summary judgment is appropriate against Berger's negligence claims because they owed her no duty of care. It is fundamental that to succeed on a negligence cause of action,

> the plaintiff must establish that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach proximately caused injury to the plaintiff. A legal duty refers to a relationship between the defendant and the plaintiff such that the law imposes on the defendant an obligation of reasonable conduct for the benefit of the plaintiff. Absent a duty, no recovery by the plaintiff is possible as a matter of law. The existence of a duty under a particular set of circumstances is a question of law for the court to decide.

Choate v. Indiana Harbor Belt R.R. Co., 2012 IL 112948, ¶ 22.

The court in *Tyrka v. Glenview Ridge Condo. Ass'n* specifically addressed the duty issue in a negligence cause of action arising from a dog bite. 2014 IL App (1st) 132762. The court acknowledged the long-held presumption that "a dog is tame, docile, and harmless absent evidence that the dog has demonstrated vicious propensities." *Id.* at ¶ 52 (quoting *Goennenwein v. Rasof*, 296 Ill. App. 3d 650, 654 (2d Dist. 1998)). "[T]o impose liability on someone other than the dog's owner

under principles of common law negligence, plaintiffs must show that a defendant premises owner had prior knowledge of the dog's viciousness." *Id.* (citing *Lucas v. Kriska*, 168 Ill. App. 3d 317, 320 (1st Dist. 1988)).

The record is uncontested that Saranathan did not know of Sunia's viciousness. Indeed, Saranathan testified he did even not know a dog lived at 218 Waverley Lane. Even if Czechowicz's testimony is credited as indicating the opposite, neither Czechowicz nor Saranathan testified that he or the other knew of Sunia's dangerous propensities.

The defendants' lack of knowledge as to Sunia's viciousness makes Berger's reliance on the lease agreement irrelevant. Even if there remains a question of fact under the contract as to who owed Berger a duty to repair the fence, gate, and latch, neither Saranathan nor Czechowicz had any reason to make repairs since neither knew of Sunia's dangerous propensities. In other words, Berger's inability to establish negligence is driven by a lack of notice, not the defendants' differing interpretations of the lease agreement.

Berger relies on the police report generated on May 30, 2019 in an attempt to establish Czechowicz and Saranathan's knowledge about Sunia's vicious propensities. Generally, statements contained in police reports are inadmissible hearsay. *Rodriguez v. Frankie's Beef/Pasta & Catering*, 2012 IL App (1st) 113155, ¶ 14 (citing *People v. Shinohara*, 375 Ill. App. 3d 85, 113 (1st Dist. 2007)). Evidence inadmissible at trial cannot be used to support or oppose a summary judgment motion. *Id.* (citing *Complete Conf. Coordinators, Inc. v. Kumon N. Am., Inc.*, 394 Ill. App. 3d 105, 108 (2d Dist. 2009)). Otherwise inadmissible hearsay may, however, come into evidence if the other party fails to object. *Id.* (citing *People v. Akis*, 63 Ill. 2d 296, 299 (1976)). In this case, both Czechowicz and Saranathan objected to Berger's attempted use of the police report; consequently, this court cannot consider it. Even if the report were admissible, it only supports the conclusion that Kalita, Sunia's owner, knew of Sunia's prior

vicious propensities, but provides no evidence from which it could be inferred that either Czechowicz or Saranathan had the same knowledge.

Berger also relies on various statements made to her by a neighbor of the 218 Waverley Lane property as to the condition of the fence and by a Schaumburg animal control officer. Those statements constitute hearsay. *See* Ill. R. Evid. 801(c) (hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). This court cannot consider this particular hearsay for purposes of summary judgment because the defendants' objected to it. Absent any other evidence that could lead to a different conclusion or inference, both motions for summary judgment must be granted and counts 4 and 6 dismissed with prejudice.

III. Property Damage Cause of Action – Count 7

Berger's property damage cause of action is based on a negligence theory. Berger alleges that Czechowicz and Saranathan's acts and omissions allowed Sunia to attack Gemma, and that Berger had to pay the medical bills for Gemma's care and treatment. Since this cause of action is based on the same negligence alleged in counts 4 and 6, a consistent result is warranted; the motion must be granted and count 7 must be dismissed with prejudice.

Conclusion

For the reasons presented above, it is ordered that:

1. Czechowicz's summary judgment motion as to counts 3, 5, and 7 is granted;
2. Saranathan's summary judgment motion as to counts 4, 6, and 7 is granted;
3. Czechowicz and Saranathan are dismissed from the case with prejudice; and

4. The case against the defaulted defendant—Kalita—continues as to counts 1, 2, and 7.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JAN 06 2021

Circuit Court 2075