STATE OF VERMONT
WINDSOR COUNTY, SS

William Burr Plaintiff v. Mark Latham, Bonnie Latham Jared Coffin and Bullard Real Estate Defendant	SUPERIOR COURT Docket No. 562-8-07 Wrcv

DECISION ON MOTION FOR SUMMARY JUDGMENT

Defendant Paino Investments, Ltd. (named and referred to hereafter as Bullard Real Estate) filed for summary judgment on July 21, 2008. Defendant Jared Coffin filed for summary judgment on July 30, 2008. Plaintiff has opposed both motions, filing a single opposition on September 3, 2008 given the similarity of issues presented by both motions.

Undisputed Facts

On June 29, 2005, Plaintiff was bitten by a dog when he came to premises rented by Mark and Bonnie Latham from its owner, Jared Coffin, in Quechee, Vt.. The Lathams own the dog, known as Wilbur. Wilbur is a pit bull.

Coffin had rented the premises to the Lathams using the services of Carefree Quechee Vacations, which, along with Bullard Real Estate, are trade names used by Paino. The premises are a single family home and were rented in its entirety to the Lathams.

Coffin consented as part of the lease agreement to allow the Lathams to keep two dogs and two cats on the premises. Neither Coffin nor Bullard were provided any information concerning the propensities of any of the pets the Lathams intended to keep on the premises.

Plaintiff disputes the existence of a rental agreement, alleging the absence of a fully signed lease document. However, the parties charged with responsibilities under the terms of the lease agreement do not dispute its existence, regardless of whether the written document was fully executed. In fact, those parties agree to its existence and its terms. Mark Latham's lack of cooperation with Plaintiff's counsel does not create a question of fact as to the existence of the lease. In their answer the Lathams admit the

existence of the lease agreement. Other than a numerical restriction, the lease contains no provision for Bullard or Coffin to assume or maintain any control over dogs or cats brought onto the premises by the Lathams.

Plaintiff was at the premises on June 29, 2005 to perform work installing cable television service. Plaintiff is a cable television service technician. At the Lathams' request, Bullard had assisted in setting up the service call and a Bullard employee was at the premises at the time of the service call.

While Plaintiff was performing his service work, he was bitten by Wilbur. Prior to the incident on June 29, 2005, neither Bullard nor Coffin had received any information about Wilbur's propensities and no knowledge of any prior biting incidents by Wilbur. Plaintiff alleges prior knowledge of Wilbur's propensities on the part of Bullard; however, the deposition transcript offered in evidentiary support contains no indication of any such knowledge.

At no time did Bullard or Coffin exercise any control over Wilbur. At no time after the premises were rented to the Lathams did Coffin or Bullard receive any information about Wilbur. Coffin had never seen Wilbur and Bullard's representatives did not see him until the incident on June 29, 2005.

Conclusions of Law

Summary judgment is appropriate when there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Westco v. Hay-Now, Inc.*, 159 Vt. 23 (1992). In considering summary judgment motions, the Court is required to construe the facts in favor of the non-movant, who is given the benefit of all reasonable doubts and inferences. *Messier v. Metropolitan Life Insurance Co.*, 154 Vt. 406 (1990). However, once the movant has put forth facts sufficient for judgment, it is incumbent upon the non-movant to come forward with specific facts sufficient to create a genuine issue of material fact. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22 (1996).

In the instant case, the Plaintiff has opposed the summary judgment, inter alia, by filing a statement of material facts not in dispute. Procedurally, Plaintiff should have filed a statement of material facts in dispute in order to meet the movants' allegations. V.R.C.P. 56 (c)(2). Despite this irregularity, the Court has considered the Plaintiff's statement of facts to be in opposition to those set forth by movants as contemplated by V.R.C.P. 56.

At the essence of a negligence claim is the existence of a legal duty. Absent a legal duty of care, there can be no cognizable negligence claim. *Watson v. Dimke*, 178 Vt. 504 (2005). For several reasons, movants owed Plaintiff no legal duty of care and therefore the claims against them must fail.

Assuming that a vicious dog on a property is considered a dangerous condition of the property, Vermont has long recognized that as between a tenant and the landlord, a third party injured as a result of a defective or dangerous condition on premises controlled by the tenant must seek redress for injuries against the tenant. *O'Brien v. Island Corp.*, 157 Vt. 135 (1991); *Beaulac v. Robie*, 92 Vt. 27 (1917). No Vermont Court has considered a dog to be a dangerous condition of property, but using that analysis here, any claim for such condition must be made against the tenant.

Plaintiff challenges the validity of the lease agreement, noting that it was not signed by one of the parties and seeking, therefore, to invoke the statute of frauds. This position is erroneous. The statute of frauds, 12 V.S.A. § 181, is an evidentiary statute for the protection of one charged with an obligation falling within the terms of the statute. Accordingly, it may be waived by the party sought to be charged. *Taplin v. Hinckley Fibre Co.*, 97 Vt. 184 (1923). Here, both parties to the lease, Coffin and the Lathams have admitted the existence of the lease. Since neither party to the agreement has disputed its existence or its terms, the agreement is enforceable as if it had been reduced to writing. *Scofield v. Stoddard*, 58 Vt. 290 (1885). The Plaintiff, not being a party to the lease, has no standing to challenge its terms. *Bryant v. Strong*, 141 Vt. 244 (1982).

It is not disputed by the parties to the lease that the entire premises was leased to the Lathams. As a result, no portion of the property remained in the control of the movants. Since neither Coffin nor Bullard retained any control over the leased premises, any claim for defective condition of the premises must be made against the person having control. *Beaulac v. Robie*, 92 Vt. 27 (1917). Again, this Court does not adopt the position that a dog biting man constitutes a dangerous condition of property, but if so, any claim sounding in that basis can not lie against those who are not in control of the premises.

Applying traditional analysis from dog bite cases yields no different result. Liability for injuries caused from dog bites is confined to the dog's owner or keeper and then only if such owner or keeper has knowledge of the dangerous propensities of the dog. *Hillier v. Noble*, 142 Vt. 552 (1983). As was stated in *Hillier*:

> Moreover, recognizing that dogs have been accepted traditionally as friends of man and often of great usefulness to him, the courts have commonly rejected the doctrine of absolute liability in dogbite cases. *Carr v. Case*, 135 Vt. 524, 525, 380 A.2d 91, 93 (1977). Nor has the doctrine been extended to the mere ownership of a dog. The general rule is that "the keeper of a domestic dog is not liable for injuries to persons and property unless the owner had some reason to know the animal was a probable source of danger." *Davis v. Bedell*, 123 Vt. 441, 442-43, 194 A.2d 67, 68 (1963). Stated another way, liability attaches only when "the dog's past behavior has been such as to require a person of reasonable prudence to foresee harm to the person or property of others."
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> 142 Vt. at 556–57.

The movants here were not the owners or keepers of Wilbur. Ownership undisputedly rests with the Lathams and the movants played no role in keeping him. By virtue of their status as landlord and as agent of the landlord, Coffin and Bullard are not deemed owners or keepers of the dog absent some ability to control it. See, e.g. *Plummer v. Ricker*, 71 Vt. 114 (1898). Such control is absent here. Under Vermont law there is no generalized duty to control vicious dogs; such duty rests only with their owners and/or keepers. *Rubin v. Town of Poultney*, 168 Vt. 624 (1998).

Further, there is no evidence here that the movants knew Wilbur had any vicious propensities. On the contrary, the undisputed facts are that neither Coffin nor Bullard had any information about Wilbur and had never seen him or heard anything about him prior to this incident. Plaintiff suggests that such assertions by the movants are "disingenuous, at best" and that they must have known something about Wilbur. The unsupported vehemence with which Plaintiff states his position does not take the place of evidence. There is no evidence before the Court creating an issue of material fact concerning movants' knowledge of any vicious propensities of Wilbur.

In summary, movants did not have control over the premises on the day of the incident sufficient to render them liable to a third person if Wilbur is considered a dangerous condition of property, a position never adopted by Vermont Courts. Further, they were not Wilbur's owner or keeper and therefore are not responsible for any injuries inflicted by him. Finally, even if they were deemed to be his owner or keeper, the movants had no knowledge of any of vicious propensity by Wilbur, a prerequisite for liability on the part of the owner or keeper in dog bite cases. "In Vermont, when a dog owner has reason to know that his dog might bite some person, then the duty of restraint attache(s); and to omit it (is) negligence." *Carr v. Case*, 135 Vt 524, 525 (1977) (citing cases).

For the reasons expressed herein, the summary judgment motions filed by Coffin and Bullard Real Estate (Paino) are **GRANTED**.

Dated at Woodstock this 24th day of September, 2008.

Harold E. Eaton, Jr.
Superior Court Judge

FILED

SEP 25 2008

WINDSOR COUNTY CLERK