

MICHAEL D. LANDIS,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-01,098
	:	
ROBERT J. STEPPE, JR., and	:	
LEROY L. & JOAN M. WALTERS,	:	
	:	
Defendant	:	SUMMARY JUDGMENT MOTION

Date: December 12, 2001

OPINION and ORDER

Before the Court is Defendants, Joan M. and Leroy L. Walters', Motion for Summary Judgment, filed July 23, 2001. The Motion seeks to dismiss Plaintiff's claims for trespass, assault and negligence against said Defendants. An amended Summary Judgment Motion was filed on July 26, 2001. Plaintiff filed an Answer to Summary Judgment on August 29, 2001. Argument was held on the Motion on September 5, 2001. Defendants Walters filed their brief on August 21, 2001, and Plaintiff filed a responsive brief on August 29, 2001. For the following reasons, Defendants Walters' Motion will be denied.

Facts

Plaintiff's claims against both Defendants Walters and Robert J. Steppe Jr., seek to recover damages for personal injuries received when Plaintiff was bitten by a dog on the premises of 312-316 Campbell Street. The incident occurred on April 10, 1998. The dog bit Plaintiff behind the right knee, causing permanent nerve and tendon damage resulting in permanent, partial disability.

According to the Second Amended Complaint, filed February 10, 2000, which references the Amended Complaint, filed November 3, 1999, Plaintiff was at the residence of

Defendant Robert J. Steppe, Jr. when the dog bite occurred. Plaintiff arrived on April 10, 1998 with Mr. Steve Lyons, who stopped to borrow money from Defendant Steppe. The uncontested facts would be that the premises of 312-316 Campbell Street were transferred to Leroy L. Walters by deed of Kathryn Wentzel Lumley, dated January 27, 1989 and recorded in Lycoming County Record Book 1372 page 142. An Agreement of Sale was entered into on August 9, 1996 between Defendant Walters and Defendant Steppe. Defendant Walters later sold the property to Ms. Steppe-Boyd, Robert Steppe Jr.'s mother,, on April 17, 1998.

It is undisputed that on April 10, 1998, there was a dog present at the 312-316 Campbell Street residence that bit Plaintiff and caused him injuries. Plaintiff alleges that at the time of the dog bite, the premises were under the control of both Defendant Walters and Robert Steppe Jr. Furthermore, Plaintiff alleges that both Defendants Walters and Steppe had a duty to protect Plaintiff from the dog and breached that duty.

Defendants Walters' Summary Judgment Motion contends that there is no genuine issue of material fact in the case at bar because neither Defendant, Joan M. nor Leroy L. Walters were in control of the premises of 312-316 Campbell Street. Defendants further allege that there is no evidence that either of the Walters had reason to know of a dangerous dog at 312-316 Campbell Street, prior to April 10, 1998. The Motion asserts that Defendant Steppe alone was in possession and control of the residence and the dog. Accordingly, Defendants Joan M. and Leroy L. Walters request this Court to grant them Summary Judgment and dismiss all claims against them.

Discussion

For the Court to grant Summary Judgment in favor of the Defendants, it must find that there is no genuine issue of material fact and that a necessary element of the cause of action filed against this Defendant is missing, and will remain so through trial. Pennsylvania Rules of Civil Procedure 1035.2. The Court's function in a summary judgment proceeding is not to determine facts, but only to determine if a material issue of fact exists. ***Godlewski v. Pars Manufacturing Company***, 597 A.2d 106 (Pa. Super, 1991). "The trial court must examine the record in the light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact in favor of the non-moving party, accepting as true all the well pleaded facts in the non-moving party pleadings and giving the non-moving party the benefit of all reasonable inferences to be drawn from them." (Standard Pa. Practice 2d, 32:113, and cases cited therein).

Defendants Walters have both submitted affidavits¹ that neither Joan nor Leroy was in control of the property at Campbell Street nor did either have any knowledge of a dangerous dog being on the premises. These affidavits will not be relevant in determining the Motion for Summary Judgment based on ***Garcia v. Savage***, 586 A.2d 1375 (Pa. Super. 1991). Summary Judgment may not be had where the moving party relies exclusively upon oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact. ***Garcia, Id.*** at 1377.

On the other hand, Plaintiff may answer the moving parties Summary Judgment Motion by filing counter-affidavits, and other documents. Rule 1035.3 of the Pennsylvania

¹ Affidavits of Defendants are attached to the Summary Judgment Motion filed July 23, 2001.

Rules of Civil Procedure imposes a requirement of a response by the non-moving party, and Summary Judgment may be entered against a party who does not respond. In our case, Plaintiff filed two letters and one deposition in answer to Defendants' Summary Judgment Motion. One letter is dated January 6, 1997, from the City of Williamsport, Bureau of Codes; the other is dated January 24, 1997, from John C. Youngman, Jr. In addition, Plaintiff filed the Deposition of Robert J. Steppe, Jr., dated January 5, 2001.

. In relation to the issue of control of the above said property, the evidence submitted by Plaintiff in response provides evidence that Defendant Steppe and Defendant Leroy Walters had an agreement that Defendant Steppe was to perform work on the Campbell Street property. Defendant Steppe testified that he filed for the work permits on the property as "contractor" not "owner." Deposition of Robert J. Steppe Jr., January 5, 2001, p. 21. This alone would present a question of control and ownership. Furthermore, the City Codes Department letter of January 6, 1997, and Mr. John Youngman Jr.'s (counsel for Defendant Walters) written response of January 24, 1997 support the averment that Defendants Walters continued to have control of the property. These letters assert that Defendant Steppe and Defendant Leroy Walters each had an ownership interest in the property and each had an interest in seeing the repair work completed.

Defendants Walters allege that once the parties formed the 1996 Sale Agreement, for the Sale of the property to Robert J. Steppe Jr., they were no longer in control of the premises and therefore had no duty to warn others of hazards on the land. However, Plaintiff argues that Defendants Walters were in possession and control of the Campbell Street

residence, otherwise they would have been unable to sell the premises to Ms. Alberta Steppe-Boyd seven days after the dog bite occurred.

On April 17, 1998, Defendants Walters sold the property at Campbell Street to Ms. Alberta Steppe-Boyd because Defendant Steppe had not been making any payments on the 1996 Agreement, nor did he complete the work on the property. There is a genuine issue of material fact in dispute as to whether Defendants Walters had regained control of the property in April 1998. Therefore, the Summary Judgment Motion will be denied on the issue of control.

The second issue of the Motion asks this Court to grant Defendants Walters' Summary Judgment, as they allege that there is no material fact to be tried with regard to either Defendant, Joan M. or Leroy L. Walter knowing of a dangerous dog on the premises of 312-316 Campbell Street.

If a dangerous dog, through the intentional, reckless or negligent conduct of the dog's owner, attacks a person or a domestic animal, the dog's owner is guilty of a misdemeanor of the second degree. In addition, the dangerous dog shall be immediately confiscated, placed in quarantine for the proper length of time and thereafter humanely killed in an expeditious manner, with costs of quarantine and destruction to be borne by the dog's owner." **3 P.S. § 459-505-A(b).**

While there is no contention that Defendants Walters were the owners of the dangerous dog, they can still be held liable if a jury determines that they were in possession or control of the property.

Restatement (Second) of Torts § 342 states:

A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, the possessor knows or has reason to know of the condition and should realize

that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and he fails to exercise reasonable care to make the condition safe, or warn the licensees of the condition and the risk involved, and the licensees do not know or have reason to know of the condition and the risk involved.²

Defendant Steppe testified that the dog was there “to scare off intruders”, and that “Mr. And Mrs. Walters had met the dog...John Youngman himself petted the dog.” Deposition of Robert J. Steppe Jr., at 23-24. Defendant Steppe also said that the dog was there all the time, and that both Mr. and Mrs. Walters would “stop by” while the guard dog was living there and the repair work was going on. Deposition of Robert J. Steppe Jr., at 24. The Codes Officer also documented that the dog was “large and mean.”³ From this evidence there arises a contested material issue of fact as to whether or not the Walters knew or should have known that a guard dog, living at the property, was a dangerous animal and did or did not exercise reasonable care to protect the Plaintiff.

“In passing upon a motion for summary judgment, moreover, a court must examine the record in the light most favorable to the non-moving party. Any doubt must be resolved against the moving party.” *French v. United Parcel Service*, 377 Pa.Super. 366, 371 547 A.2d 411, 414 (1988). Therefore, Defendants Walters’ Summary Judgment Motion as to Defendants not having control of the property or protecting Plaintiff from a dangerous dog they were aware was at the premises is denied.

² As cited in *Baran v. Pagnotti Enterprises, Inc.*, 586 A.2d 978 (Pa. Super. 1991).

³ Memo attached to the Plaintiff’s Brief in Opposition to Summary Judgment was filed August 20, 2001.

ORDER

Defendants Joan M. and Leroy L. Walters' Motion for Summary Judgment is
DENIED.

BY THE COURT:

William S. Kieser, Judge

cc: Marc S. Drier, Esquire
John C. Youngman, Jr., Esquire
Judges
Suzanne R. Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)