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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARILYNNE MEYSTRIK,

Plaintiff and Appellant,

v.

KENNETH COVEY et al.,

Defendants and Respondents.

F061921

(Kern Sup. Ct. No. S-1500-CV-  
268020)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Law Office of Donald C. Duchow and Donald C. Duchow for Plaintiff and Appellant.

Mark R. Weiner & Associates and Kathryn Albarian for Defendants and Respondents.

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## **INTRODUCTION**

Appellant Marilynne Meystrik appeals from a summary judgment (Code Civ. Proc, §437c) in an action for personal injuries sustained after she was bitten by a dog owned by the tenant of respondent landlords, Kenneth and Patti Covey.

## **STATEMENT OF THE CASE**

On August 6, 2009, appellant filed a complaint for personal injury against respondents, alleging two causes of action for general negligence arising from the bites of a dog owned by respondent's tenant, codefendant Alice Catherine Hay.<sup>1</sup> Appellant asserted lost wages, hospital and medical expenses, general damage, loss of earning capacity, and emotional distress. She prayed for compensatory damages according to proof.

On November 19, 2009, respondents filed an answer generally denying the material allegations of the complaint and setting forth five affirmative defenses. As to the fifth affirmative defense to the entire complaint, respondent alleged they "had no knowledge of any animal within these answering defendants' control which was dangerous by nature, or which these answering defendants knew, or had reason to know, to have any dangerous propensities."

On June 28, 2010, respondents filed a motion for summary judgment as to all causes of action based primarily on the affirmative defense of lack of knowledge. Respondents specifically alleged "the defendants did not owe or breach a duty of care owed to plaintiff because ... [d]efendants did not own the dog that bit plaintiff; [d]efendants did not keep the dog that bit plaintiff; and ... [d]efendants did not know of the dog's vicious propensities."

On the same date, respondents filed a separate statement of undisputed material facts and supporting evidence.

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<sup>1</sup> Hay is not a party to the instant appeal.

On August 27, 2010, appellant filed written opposition to the summary judgment motion.

On September 2, 2010, respondents filed a written reply to appellant's opposition to the motion for summary judgment. On the same date, respondents filed written evidentiary objections to a declaration submitted in opposition to their motion for summary judgment.

On September 13, 2010, the court conducted a hearing and, by minute order, granted the motion for summary judgment as to appellant's entire case.

On September 24, 2010, the court filed a formal order granting motion for summary, stating in relevant part:

“[T]he Court determined that defendants met their burden of showing they had no prior actual knowledge of the dog's vicious propensities, that plaintiff has not responded thereto with evidence to establish that defendant[s] had prior actual knowledge of the dog's vicious propensities, that therefore there is no triable issue as to any material fact and defendants are entitled to summary judgment as a matter of law, based on the following material facts and supporting evidence:

“Defendants Kenneth Covey and Patti Covey did not own or keep the dog that allegedly bit plaintiff Marilynne Meystrik on August 6, 2007...; on August 6, 2007, the dog's owner lived across the street from plaintiff in a house the dog's owner rented from Kenneth Covey and Patti Covey...; at no time prior to August 6, 2007, did Kenneth Covey or Patti Covey see nor where they told by anyone that the dog exhibited dangerous propensities, ran in the neighborhood off leash, escaped from the property, bit anyone, or dug under the fence ....”

On the same date, the court filed a formal summary judgment in favor of respondents.

On September 28, 2010, appellant filed a motion to vacate the order granting motion for summary judgment on the ground the ruling was taken against appellant due to the inadvertence and excusable neglect of her counsel (Code Civ. Proc., § 473). In a declaration, appellant's trial counsel explained that he arrived in court late on the date of the contested hearing because of side effects from medicine taken in preparation for

scheduled dental surgery. Counsel further acknowledged that he arrived in court after the court ruled on the summary judgment motion.

On October 15, 2010, respondents filed written opposition to appellant's motion to vacate order granting summary judgment.

On November 10, 2010, the court granted the motion to vacate and set November 15, 2010, as the new hearing date for the summary judgment motion.

On November 15, 2010, the court conducted a hearing on the motion for summary judgment and took the matter under submission. The court stated in pertinent part:

“The plaintiff's response to undisputed material fact No. 7, which is essentially that the Coveys had no prior knowledge that the dog exhibited dangerous propensities, the response to that is that plaintiff admits her own lack of knowledge and that the plaintiff is unable to ascertain any knowledge or lack of knowledge upon the part of defendants, which seems to carry the day with respect to the Coveys' motion.”

On November 18, 2010, the court filed a minute order granting respondents' motion to summary judgment, stating: “The defendant landlords carried their burden of showing they possessed no knowledge of their tenant's dog's vicious propensities. Plaintiff did not respond with evidence creating a triable issue of fact as to that lack of knowledge.”

On December 14, 2010, the court filed a formal summary judgment.

On February 10, 2011, appellant filed a timely notice of appeal from the December 14, 2010, judgment.<sup>2</sup>

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<sup>2</sup> A summary judgment is an appealable judgment as in other cases. (Code Civ. Proc., § 437c, subd. (m)(1).)

## **STATEMENT OF FACTS**<sup>3</sup>

On August 6, 2007, a border collie owned by one Alice Hay bit appellant while the latter was on her own real property on Beech Street in Bakersfield. Hay, who lived across the street from appellant, resided in a house that she rented from respondents Kenneth and Patti Covey beginning in April or May 2007. Both respondents had seen Hay's dog prior to the attack and said the dog did not exhibit any vicious, dangerous, or aggressive behavior. Respondent Kenneth Covey declared that he had seen Hay's dog on approximately eight occasions between the time Hay rented the house and August 6, 2007. Respondent Patti Covey declared that she had seen Hay's dog on one occasion, on the date that she and her husband rented the Beech Street house to Hay. Prior to the attack, respondents did not see, nor did anyone inform them, that Hay's dog dug under the fence at the rental property, escaped from the rental property, or was running off leash in the neighborhood of the rental property. Prior to the attack, respondents did not know and no one told them that Hay's dog bit or exhibited dangerous propensities. Appellant did not know how the dog that bit her escaped from the property rented by Hay.

## **DISCUSSION**

### **I. THE TRIAL COURT PROPERLY HELD THERE WERE NO TRIABLE ISSUES OF MATERIAL FACT**

Appellant contends the trial court erroneously granted summary judgment because there were triable issues of material fact relating to respondents' "prior knowledge of the dog's violent tendencies," thereby giving rise to a legal duty to exercise due care.

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<sup>3</sup> For purposes of the summary judgment motion, the respondents accepted appellant's version of the incident as true. The statement of facts on appeal is drawn from respondents' declarations in support of motion for summary judgment, appellant's February 10, 2010, deposition, appellant's responses to respondent's request for admissions, respondents' June 28, 2010, separate statement of undisputed material facts, and appellant's August 27, 2010, response to respondents' separate statement.

### **A. Law of Summary Judgment**

A defendant moving for summary judgment may present evidence conclusively negating the plaintiff's claim, or evidence showing the plaintiff cannot establish at least one element of the cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 853.) When the defendant moves for summary judgment on the ground that there is an affirmative defense to the action, the defendant meets the initial burden by establishing all the elements of the affirmative defense. (See *Jessen v. Mentor Corp.* (2008) 158 Cal.App.4th 1480, 1484-1485; *Mirzada v. Department of Transportation* (2003) 111 Cal.App.4th 802, 806-807.)

A defendant or respondent moving for summary judgment based upon an affirmative defense bears the burden of persuasion that there is a complete defense to the plaintiff's action; in other words, "he must persuade the court that there is no material fact for a reasonable trier of fact to find as to that defense." (*Rancho Viejo v. Tres Amigos Viejos* (2002) 100 Cal.App.4th 550, 557-558 (*Rancho Viejo*) [citing *Aguilar v. Atlantic Richfield Co.*, *supra*, 25 Cal.4th at p. 850, fn. 11].) To meet this burden of persuasion, the defendant has the initial burden of presenting "evidence" supporting a prima facie showing of the nonexistence of any triable issue of material fact as to the defense. (*Aguilar v. Atlantic Richfield Co.*, *supra*, at p. 850 [citing Evid. Code, § 110; *Rancho Viejo*, *supra*, 100 Cal.App.4th at p. 558].) The court must consider not only the bare evidence, but also the reasonable inferences deducible from the evidence and determine whether the evidence is sufficient to support a potential judgment in favor of the opposing party. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

To show a complete defense, a defendant must present admissible evidence of each essential element of the defense upon which it bears the burden of proof at trial. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 289.) Thus, where a defense has several elements, lack of substantial evidence on any element bars relief "even if the plaintiff failed to introduce a scintilla of evidence challenging that element."

(*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831.) The defendant cannot base its showing on plaintiff's lack of evidence to disprove its claimed defense. (*Consumer Cause, Inc. v. Smilecare* (2001) 91 Cal.App.4th 454, 472 (*Consumer Cause*).

Once defendant meets this burden, the burden shifts to plaintiff to produce admissible evidence showing the existence of a triable issue of fact regarding the affirmative defense. (*Consumer Cause, supra*, 91 Cal.App.4th at p. 468.) The opposing party may not rely upon allegations or denial in its pleadings. Rather, it must "set forth the specific facts showing that a triable issue of material fact exists ...." (Code Civ. Proc., § 437c, subd. (p)(2); *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 411; *FSR Brokerage, Inc. v. Superior Court* (1995) 35 Cal.App.4th 69, 73-75, fn. 4.)

Notably, the plaintiff may not rely upon the mere allegations or denials of its pleadings to show the existence of a triable issue of fact; rather, "[t]here is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof...." (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850, fn. omitted; see also Code Civ. Proc., § 437c, subd. (o)(2); *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 464, fn. 4; *Scheidung v. Dinwiddie Construction Co.* (1999) 69 Cal.App.4th 64, 69.)

On appeal, although this court's review of the superior court's entry of summary judgment in favor of respondent is de novo, requiring this court to apply the same legal standard that governed the superior court (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404; *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476; *Slovensky v. Friedman* (2006) 142 Cal.App.4th 1518, 1522), this court may "affirm the [superior court's] ruling if it is correct on any ground, regardless of the trial court's stated reasons." (*Rancho Viejo, supra*, 100 Cal.App.4th at p. 558 [citing *Stratton v. First Nat. Life Ins. Co.* (1989) 210 Cal.App.3d 1071, 1083].)

Because “ ‘a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, we independently review them on appeal, applying the same three-step analysis required of the trial court. [Citation.]’ [Citation.] ‘First, we identify the issues framed by the pleadings,’ since the motion and opposition must be addressed to these issues. [Citation.] Second, we determine whether the moving party has met its burden of proof by establishing facts which negate the opponent’s claim and justify a judgment in movant’s favor. [Citation.] When a defendant is the moving party, [its] declarations and evidence must either establish a complete defense to plaintiff’s action or demonstrate an absence of an essential element of plaintiff’s case.’ [Citation.] If the moving party meets its burden of proof, then ... we look to ‘the third and final step to determine whether the opposition demonstrates the existence of a triable, material factual issue.’ [Citation.]” (*Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1501-1502.)

**B. Law of Landlord Liability for Tenants’ Pets**

Appellant’s negligence action requires a showing that respondents owed appellant a legal duty, that respondents breached that duty, and that the breach was a legal cause of injuries suffered by the appellant. (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1532.) Respondents’ summary judgment motion challenged the proof that they owed a legal duty of care to appellant, which is a necessary element of the causes of action for negligence. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673, disapproved on another point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5.) Summary judgment in favor of a defendant will be upheld when the evidentiary submissions conclusively negate a necessary element of the plaintiff’s cause of action or show that under no hypothesis is there a material issue of fact requiring the process of a trial. (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 411.)

“ ‘Generally, one owes a duty of ordinary care not to cause an unreasonable risk of harm to others.’ [Citations.]” (*Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 747.) Civil

Code section 1714, subdivision (a), states: “Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself.” “[A]pplication of this provision entails an inquiry as to whether, in the management of property [the landlord] has acted as a reasonable [person] in view of the probability of injury to others ....’ [Citations.]” (*Laico v. Chevron U.S.A., Inc.* (2004) 123 Cal.App.4th 649, 659.)

“Under California law, a landlord who does not have actual knowledge of a tenant’s dog’s vicious nature cannot be held liable when the dog attacks a third person. In other words, where a third person is bitten or attacked by a tenant’s dog, the landlord’s duty of reasonable care to the injured third person depends on whether the dog’s vicious behavior was reasonably foreseeable. Without knowledge of a dog’s propensities a landlord will not be able to foresee the animal poses a danger and thus will not have a duty to take measures to prevent the attack.” (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1838.)

Thus, to determine “whether the landlord of noncommercial real property owes a duty of reasonable care toward an injured third person,” a reviewing court must undertake a two-step analysis. (*Martinez v. Bank of America* (2000) 82 Cal.App.4th 883, 891.) “First, [the court] must ask whether the landlord had actual knowledge that the dog was vicious.” (*Ibid.*) A landlord can only be liable if he or she had actual knowledge of the dog’s vicious propensity. This can be satisfied by circumstantial evidence that the landlord must have known about the dog’s dangerousness as well as direct evidence he actually knew. (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 507, 514; *Yuzon v. Collins* (2004) 116 Cal.App.4th 149, 163.) “Second, [the reviewing court must] ask whether the landlord had the ability to prevent the foreseeable harm. That ability derives from the landlord’s control over his [or her] property and his [or her] ability to prevent

dangerous conditions on that property. [Citation.]” (*Martinez v. Bank of America, supra*, 82 Cal.App.4th at p. 891.) “[O]nly when the landlord has actual knowledge of the animal [and its dangerous propensities], coupled with the right to have it removed from the premises, does a duty of care arise.” (*Uccello v. Laudenslayer, supra*, 44 Cal.App.3d at p. 514; *Yuzon v. Collins, supra*, 116 Cal.App.4th at p. 163.)

**C. Analysis**

**1. Pleadings**

In the first cause of action for general negligence, appellant alleged: “Defendant Alice Catherine Hay owned a dog [that] bit Plaintiff, at above mentioned place and time, causing Plaintiff serious personal injury consisting of but not limited to bites to the right foot and both legs.” In the second cause of action for general negligence, appellant alleged that “[Patti] Covey, Kenneth Covey, rented property to Defendant Alice Catherine Hay where Defendant kept the dog which attacked Plaintiff. These Defendants knew, or with reasonable diligence should have known that the dog had vicious propensities which could cause an attack to Plaintiff or other persons. With such knowledge, Defendants did nothing prevent such an attack. An attack did occur, causing serious injuries to Plaintiff consisting of but not limited to bites to the right foot and both legs.”

Respondents stated in their answer to complaint: “For a fifth separate and affirmative defense to the complaint on file herein, and to each alleged cause of action contained therein, these answering defendants allege[] that defendants had no knowledge of any animal within these answering defendants’ control which was dangerous by nature, or which these answering defendants knew, or had reason to know, to have any dangerous propensities.” The caption to that affirmative defense stated: “FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE TO THE ENTIRE COMPLAINT (NO KNOWLEDGE OF VICIOUS PROPENSITY).”

## **2. Separate Statements of Undisputed Material Facts and Declarations in Support of the Summary Judgment Motion**

In their motion for summary judgment, filed June 28, 2010, respondents asserted “[t]he undisputed evidence establishes that defendants are not liable for plaintiff’s injuries ... because ... [t]hey did not own or keep the dog that bit or attacked plaintiff; and ... [t]hey did not have prior actual knowledge of any dangerous propensities of the dog that bit or attacked plaintiff.”

In their separate statement of undisputed material facts, filed the same date, respondents maintained that at no time prior to August 6, 2007, did they see or learn from anyone that Hay’s dog (1) dug under the fence of the rental property; (2) was running in the neighborhood off leash; (3) bit others; and (4) exhibited dangerous propensities. Kenneth Covey’s made the same averments in his June 23, 2010, declaration in support of the motion for summary judgment. He also declared that he was aware that Hay owned a puppy prior to the rental of the property. Covey stated that he observed the puppy prior to renting the property to Hay and “[t]he puppy did not exhibit any aggressive, dangerous, or vicious behavior. It was a very sweet dog.” He also said he saw the dog on approximately eight occasions after the property was rented to Hay and “[t]he puppy did not exhibit any aggressive, dangerous, or vicious behavior.” In her separate June 23, 2010, declaration in support of motion for summary judgment, Patti Covey concurred with the averments of her husband’s declaration. She declared in pertinent part: “I observed the puppy prior to renting the property to Ms. Hay. The puppy did not exhibit any aggressive, dangerous, or vicious behavior. It was a very sweet dog. That was the only time I saw Ms. Hay’s dog.”

In her opposition to respondents’ separate statement to undisputed facts, appellant offered the following response to each of the foregoing undisputed facts of the respondents: “Plaintiff admits as to her lack of knowledge. Plaintiff is unable to ascertain

any knowledge or lack of knowledge upon the part of Defendants.”<sup>4</sup> Appellant attached a portion of her deposition transcript and a declaration of one Joyce Martinson to her written opposition to respondents’ motion for summary judgment. In the deposition, appellant mentioned that a border collie went into her yard, growled under a “cooler,” and that this occurred before she was bitten. In her May 4, 2010, declaration, Martinson averred that she visited appellant in early September 2007 and “observed the dog which had bitten Marilynne, trotting north down the street, at a fast clip. The dog was without a leash and unaccompanied. The dog was about one third of the way into the street.”

### **3. Conclusion**

The party against whom the summary judgment motion is directed must produce evidence showing some triable issue of material fact. (Code Civ. Proc., § 437c, subd. (b)(3).) To establish a triable issue of material fact, the party opposing the motion must produce substantial responsive evidence. (*Sangster v. Paetkau*, *supra*, 68 Cal.App.4th at p. 166.) The proof must show a triable issue of fact and equivocal evidence will not suffice. (*Ahrens v. Superior Court* (1988) 197 Cal.App.3d 1134, 1152.) The opposing party cannot controvert the moving party’s declarations by evidence based on speculation, imagination, guess work or mere possibilities. (*Doe v. Salesian Society* (2008) 159 Cal.App.4th 474, 481.)

Respondents properly point out that appellant did not present evidence challenging the credibility of their June 23, 2010, declarations. Further, appellant did not present evidence to show that respondents knew or must have known that Hay’s dog had dangerous propensities prior to the August 6, 2007, incident. The only evidence appellant presented was the declaration of Joyce Martinson to the effect that she saw the

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<sup>4</sup> “[T]o avert summary judgment the plaintiff must produce substantial responsive evidence sufficient to establish a triable issue of material fact on ... the defendant’s showing. [Citations.] [R]esponsive evidence that gives rise to no more than speculation cannot be regarded as substantial, and is insufficient to establish a triable issue of material fact. [Citations.]” (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163.)

dog unleashed and unaccompanied on the street about one month after the August 6, 2007, incident occurred. Appellant contends: “Respondents both claimed the dog was a sweet dog. Calling the dog sweet might indeed have meant that the declarants knew the dog was not sweet, creating a reasonable inference of actual knowledge regarding the violent nature of the subject dog ....” Appellant’s contention is essentially an effort to controvert respondents’ declarations with speculation, guesswork, or mere possibilities and is impermissible under the California law of summary judgment. (*Doe v. Salesian Society, supra*, 159 Cal.App.4th at p. 481.)

The trial court properly ruled with respect to the fifth affirmative defense to the entire complaint that “defendant landlords carried their burden of showing they possessed no knowledge of their tenant’s dogs vicious propensities.” Plaintiff did not respond with evidence creating a triable issue of fact as to that lack of knowledge.

**DISPOSITION**

The judgment is affirmed. Costs are awarded to respondents.

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Poochigian, J.

WE CONCUR:

\_\_\_\_\_  
Wiseman, Acting P.J.

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Franson, J.