

U] Suzuki v. Park, No. G030685 (Cal.App. Dist.4 08/26/2003)

[1] IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT DIVISION THREE

[2] G030685

[3] 2003.CA.

[4] August 26, 2003

[5] SHIG SUZUKI, PLAINTIFF AND APPELLANT,
v.
CHAN HIE PARK, DEFENDANT AND RESPONDENT.

[6] Appeal from a judgment of the Superior Court of Orange
County, Randell L. Wilkinson, Judge. Affirmed. (Super. Ct. No. 01CC07359)

[7] Law Offices of Marc Vincent & Associates and Marc Vincent for
Plaintiff and Appellant.

[8] Early, Maslach & Rudnicki and Priscilla F. Slocum for
Defendant and Respondent.

[9] The opinion of the court was delivered by: Fybel, J.

[10] NOT TO BE PUBLISHED IN OFFICIAL REPORTS

[11] California Rules of Court, rule 977(a), prohibits courts and
parties from citing or relying on opinions not certified for publication or
ordered published, except as specified by rule 977(b). This opinion has
not been certified for publication or ordered published for purposes of
rule 977.

[12] OPINION

[13] Introduction

[14] A tenant who lived in an apartment complex was bitten by a
dog owned by another tenant. The victim/tenant sued the landlord,

asserting a claim for premises liability and a claim under Civil Code section 3342 – the dog bite statute. The landlord's motion for summary judgment was granted. The victim/tenant appeals.

[15] A landlord's duty to prevent a tenant's dog from causing harm exists only when the landlord has actual knowledge of the dog's viciousness and has the ability to prevent the foreseeable harm. (*Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1838–1839; *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 507.) There was no triable issue of fact regarding the landlord's ability to prevent foreseeable harm. Therefore, summary judgment was properly granted.

[16] While conceding the landlord was not the dog's owner, the victim/tenant asserted the dog owner/tenant was the landlord's employee, making the landlord liable under the theory of respondeat superior. The victim/tenant, however, neither pleaded this theory of liability nor offered admissible evidence supporting it. The trial court did not err by granting summary judgment.

[17] The trial court did not abuse its discretion in denying the victim/tenant's unsupported request for a continuance of the summary judgment hearing.

[18] Facts

[19] On March 31, 2001, plaintiff Shig Suzuki was walking on a walkway in his apartment complex. His neighbor, Joe Lee, was walking his dog on the same walkway and approaching from the opposite direction. The dog bit Suzuki on the hand.

[20] On two or three occasions before this incident, Suzuki had seen the dog on a leash with Lee. Lee had lived on the premises since March 1, 2001.

[21] Defendant Chan Hie Park is the owner and landlord of the apartment complex. Park is not the dog's owner.

[22] Suzuki sued both Lee and Park for his injuries. First, Suzuki alleged premises liability against Park for negligently allowing a dangerous dog on the premises. Second, Suzuki alleged Park and Lee were

liable under the dog bite statute, Civil Code section 3342, as the alleged owners of the dog.

[23] Park moved for summary judgment. Park declared she never owned or controlled Lee's dog and had never received any complaints about the dog before Suzuki was bitten. Park also offered as evidence Suzuki's deposition in which he testified he had never complained to Park about the dog, knew of no one who complained to Park about the dog being mean or aggressive, and had no information suggesting Park knew the dog was dangerous.

[24] Suzuki opposed the motion for summary judgment with declarations from Bill and Elizabeth Gibbons, who also lived in the apartment complex. (We will refer to these witnesses as Bill and Elizabeth to avoid confusion, and mean no disrespect.) Elizabeth declared she had complained to Park about the dog's viciousness before it bit Suzuki. Elizabeth declared Park told her, and Bill declared both Park and Lee told him, Lee would be acting as the manager of and handyman for the property. But Bill and Elizabeth did not specify when these statements were made or when Lee would undertake these duties.

[25] At the hearing on Park's motion, Suzuki's counsel requested a continuance to conduct further discovery regarding whether Park had adequate notice to prevent the injury. After taking the matter under submission, the court granted the summary judgment motion. In its minute order, the trial court stated: "Plaintiff has failed to submit competent, admissible evidence to show that Park was aware of the vicious nature of the dog, or that such awareness was imparted to Park sufficiently before the attack that the landlord could have taken appropriate action." Judgment was entered in Park's favor, and Suzuki appealed.

[26] Discussion

[27] I. The Trial Court Properly Granted Park's Motion for Summary Judgment

[28] A. Standard of review and summary judgment standards

[29] "A trial court properly grants summary judgment where no

triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has `shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff `may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action' (Code Civ. Proc., § 437c, [former] subd. (o)(2) [, now subd. (p)(2)]. . . .)" (Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465, 476–477.)

[30] B. The trial court properly granted summary judgment on Suzuki's premises liability claim.

[31] 1. Summary of California law on the liability of a landlord for injuries caused by a tenant's dog.

[32] Suzuki's first claim was for premises liability. As a general rule, the owner of property is liable for injuries occurring on his or her property as a result of the owner's "want of ordinary care or skill in the management of his or her property." (Civ. Code, § 1714, subd. (a); see also Rowland v. Christian (1968) 69 Cal.2d 108, 118–119.) A property owner may be liable for injuries caused by his or her tenant's dog under the theory of premises liability. "Under what circumstances does a landlord owe a duty of care to his tenant's invitees to prevent injury from an attack by a vicious dog kept by the tenant on the leased premises? We hold that a duty of care arises when the landlord has actual knowledge of the presence of the dangerous animal and when he has the right to remove the animal by retaking possession of the premises." (Uccello v. Laudenslayer, supra, 44 Cal.App.3d 504, 507.)

[33] The two–step process for determining whether a landlord owed a duty to the victim of a tenant's dog's bite is set forth in Donchin v. Guerrero, supra, 34 Cal.App.4th at pages 1838–1839: "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. [¶] In this court's view, this inquiry into the landlord's duty involves a two-step approach. The first step is to determine the landlord's knowledge of the dog's vicious nature. In *Uccello v. Laudenslayer*, supra, 44 Cal.App.3d 504 . . . , the court established a landlord can only be liable if he or she had actual knowledge of the dog's vicious propensity. . . . [¶] The second step involves a landlord's ability to prevent the foreseeable harm. In *Uccello* the court relied on *Dennis v. City of Orange* (1930) 110 Cal.App. 16 . . . to establish the principle the landlord's duty derives from his control and ability to prevent dangerous conditions on his property. In *Dennis*, a landlord was held liable for a nuisance created by a tenant's gravel excavation. The court stated, '[t]he ground of the defendant's liability for the nuisance is that it existed at a time when he had the opportunity or power to abate or remove it and failed to do so.' [Citation.] Thus, the injuries the dogs cause must be ones which would not have occurred if the landlord had taken actions which were within his power. In the cases of dangerous dogs, that potential power is found in whatever rights the landlord may have to insist the tenant remove the dogs from the leased premises or to insure the property is so secure the dogs cannot escape to harm persons on or off the property. . . . [¶] In light of the above stated principles, plaintiff correctly contends the landlord owed her a duty of care if the landlord knew of the dogs' vicious propensities and if he had the power to have taken measures on the property he controls which would have prevented plaintiff's injuries."

[34] 1.Park carried her initial burden disproving the element of duty.

[35] Park offered admissible evidence that she had no actual knowledge of Lee's dog's viciousness. Park declared she had never received complaints about the dog from anyone before Suzuki was bitten. Park never even saw the dog, although a reference to the dog in the rental agreement between Park and Lee proves she knew the dog existed. Park also offered excerpts from Suzuki's deposition, in which he testified he had never complained to Park about the dog and was not aware of anyone

else who had. If Park had no knowledge of the dog's viciousness, no harm was reasonably foreseeable, and Park had no duty to prevent an unforeseeable harm. (*Donchin v. Guerrero*, supra, 34 Cal.App.4th at p. 1838.) Park successfully shifted the burden of production to Suzuki, requiring Suzuki to make a prima facie showing of the existence of a triable issue of material fact. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 845, 849.)

[36] 2.Suzuki failed to raise a triable issue of material fact.

[37] In opposition to the motion for summary judgment, Suzuki submitted only Bill's and Elizabeth's declarations. Bill's declaration did not address the issue of Park's actual knowledge of the dog's viciousness. Elizabeth's declaration, however, stated: "I complained to Joe Lee and Mrs. Park about the viciousness of the dog prior to the biting of Mr. Suzuki." (Italics added.)

[38] The trial court refused to consider Elizabeth's declaration because it was defective. The minute order read in relevant part: "She never tells us how the complaint was made (by mail, phone, e-mail, face to face conversation?) or how soon the complaint was made before the attack. Such information is crucial for the trier of fact in a case where notice is a key issue." Whether the court erred in excluding the declaration is reviewed for an abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 900.) With respect to Elizabeth's statement that she complained to Park about the viciousness of Lee's dog "prior to the biting of Mr. Suzuki," the trial court abused its discretion in refusing to consider the statement. Although the declaration does not specify the date on which Elizabeth notified Park of the dog's viciousness, it stated she did so before the incident occurred. To prove Park had actual knowledge of the dog's viciousness, Suzuki did not need to show Park had that knowledge on any particular day, although Suzuki did need to show Park had that knowledge before the incident occurred. Elizabeth's declaration was admissible evidence that Park had knowledge of Lee's dog's viciousness before Lee's dog bit Suzuki.

[39] Suzuki failed, however, to raise a triable issue that Park had the ability to prevent the harm. In a practical sense, a landlord may prevent an injury by a vicious dog by requiring the tenant to remove the dog or evicting the tenant. (*Donchin v. Guerrero*, supra, 34 Cal.App.4th at

pp. 1838–1839.) Here, the trial court's determination that Elizabeth's declaration was not competent evidence was correct and is dispositive. The trial court did not abuse its discretion in determining Elizabeth's declaration was speculative, imprecise, and lacking in foundation on this point. Elizabeth's declaration did not provide the date on which she made Park aware of the dog's viciousness, or any way to determine when she did so. Therefore, Suzuki failed to raise a triable issue of material fact that Park had the ability to prevent the harm.

[40] Suzuki failed to offer admissible evidence to create a triable issue of material fact that Park had the ability to prevent the harm because it cannot be determined when Elizabeth warned Park the dog was vicious and whether Park had enough time to remove the dog before it bit Suzuki. The trial court properly granted Park's motion for summary judgment on the premises liability claim. *fn1

[41] C. The trial court properly granted summary judgment on Suzuki's claim under the dog bite statute.

[42] Suzuki also alleged Park was liable for his injury under Civil Code section 3342, California's dog bite statute. "The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness." (Civ. Code, § 3342, subd. (a).) As a tenant in the apartment complex, Suzuki was unquestionably "lawfully in a private place" at the time he was bitten by Lee's dog.

[43] This statute imposes liability only on the owner of the dog. (Civ. Code, § 3342, subd. (a).) It was undisputed Lee, not Park, owned the dog.

[44] In Suzuki's opposition to the motion for summary judgment, Suzuki did not claim Park actually owned the dog, but instead argued for the first time that Park was liable under the theory of respondeat superior. Suzuki's failure to plead respondeat superior as a theory of liability "precludes his reliance on such a theory to defeat the summary judgment motion." (Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal.App.4th 1334, 1343.)

[45] Even if the issue of Park's liability as Lee's employer had been before the trial court, Suzuki failed to raise a triable issue of material fact regarding Lee's employment by Park. Bill's and Elizabeth's declarations failed to indicate Lee was employed by Park at the time Lee's dog bit Suzuki. The declarations merely stated that on an unspecified date, Park told Bill and Elizabeth that Lee would act as her manager without indicating when he would undertake that role. Bill declared: "During this time, Joe Lee and Mrs. Park, the owner of the apartments, let this declarant know that Joe Lee was the manager of the apartment complex which includes approximately 4 units. Joe Lee was also represented as the handyman for the complex by Mrs. Park." Elizabeth declared: "Mrs. Park, the owner of the apartments, represented to this Declarant that Joe Lee would be the manager for the apartment complex. Joe Lee would fix the property both outside and inside the apartments. This Declarant was informed by Mrs. Park that Joe Lee was working for her and her husband, owners of the apartments." The trial court did not abuse its discretion in refusing to consider these declarations because they were speculative, irrelevant, and lacked foundation. Absent evidence Lee was employed as Park's manager on the date of the incident, respondeat superior liability does not arise.

[46] The parties have not cited, and we have not located, any case imposing liability against an employer for injuries caused by the employee's dog. Even if we assumed Lee was Park's employee on the day of the incident, Suzuki presented no evidence the dog bite occurred while Lee was acting within the course and scope of his employment. An employer is not responsible for every act of an employee committed during work hours. (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1560.) "Respondeat superior liability demands a nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer." (*Ibid.*) No evidence supported any contention Lee's dog was a work dog, and walking one's dog is not normally an act within the course and scope of employment.

[47] The trial court properly granted Park's motion for summary judgment.

[48] II. The Trial Court Did Not Abuse Its Discretion in Refusing to Continue the Motion for Summary Judgment

[49] Suzuki argues the trial court erred by refusing to continue the hearing on the motion for summary judgment to allow Suzuki to obtain additional evidence. Suzuki failed to meet the statutory requirements to obtain a continuance. At the time of the hearing in this case, Code of Civil Procedure section 437c, subdivision (h) provided "[i]f it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." The party requesting a continuance must show "` . . . (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts.'" [Citations.]" (Frazee v. Seely (2002) 95 Cal.App.4th 627, 633.) Whether to grant or deny a request for a continuance of a motion for summary judgment is a decision committed to the discretion of the trial court. (Ibid.)

[50] Suzuki failed to establish cause to continue the hearing on the motion for summary judgment under Code of Civil Procedure section 437c, subdivision (h). Neither the declarations of Bill and Elizabeth submitted in opposition to the motion nor Suzuki's counsel's statements at the hearing show any facts Suzuki needed to oppose the motion, or why he needed more time to obtain them. Suzuki's request for a continuance of the hearing on Park's motion for summary judgment was insufficient and unsupported. The trial court did not abuse its discretion in refusing to continue the hearing.

[51] Disposition

[52] The judgment is affirmed. Park shall recover her costs on appeal.

[53] WE CONCUR:

[54] SILLS, P. J.

[55] IKOLA, J.

Opinion Footnotes

[56] *fn1 Park argues on appeal the declarations of Bill and Elizabeth should not have been considered because Suzuki failed to disclose Bill and Elizabeth as potential witnesses in discovery. The trial court did not base its ruling on this argument, and therefore we will not consider it. (Code Civ. Proc., § 437c, subd. (m)(2).)