FOURTH DEPARTMENT

ANIMAL LAW, EVIDENCE.

DEFENDANT DOG OWNER'S ACKNOWLEDGMENT SHE HAD HEARD THAT ONE OF HER DOGS NIPPED A BOY IN A PRIOR INCIDENT WAS NOT ADMISSIBLE EVIDENCE OF THE FACTS OF THE INCIDENT; THEREFORE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THIS DOG BITE CASE SHOULD NOT HAVE BEEN GRANTED.

The Fourth Department, reversing Supreme Court, determined plaintiffs' motion for summary judgment in this dog bite case should not have been granted. The plaintiffs relied on deposition testimony in which defendant acknowledged she had heard about a prior incident in which a boy was nipped by one of her dogs. Defendant's statement was inadmissible hearsay: "Plaintiffs failed, however, to submit evidence in admissible form regarding the purported prior incident allegedly establishing the existence of the dogs' vicious propensities. Instead, plaintiffs relied on defendant's inadmissible hearsay testimony during her deposition about what she had heard from others regarding the purported prior incident, for which she was not present and about which she had no firsthand knowledge ... . Such evidence is insufficient to meet plaintiffs' burden on their motion for summary judgment ... . It is true that, '[i]f a party makes an admission, it is receivable even though knowledge of the fact was derived wholly from hearsay' ... . If, however, the party merely admits that he or she heard that an event occurred in the manner stated, the party's statement is 'inadmissible as then it would only . . . amount[ ] to an admission that he [or she] had heard the statement which he [or she] repeated and not to an admission of the facts included in it'... . Here, defendant merely admitted that she had heard that the purported prior incident occurred in the manner stated by others, which is 'in no sense an admission of any fact pertinent to the issue, but a mere admission of what [she] had heard without adoption or indorsement. Such evidence is clearly inadmissible' ...". ***Christopher P. v. Kathleen M.B.*, 2019 N.Y. Slip Op. 05894, Fourth Dept 7-31-19**

ANIMAL LAW, EVIDENCE.

PLAINTIFFS DID NOT DEMONSTRATE DEFENDANT HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE DOG'S VICIOUS PROPENSITIES IN THIS DOG BITE CASE, DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED.

The Fourth Department determined defendant's motion for summary judgment in this dog bit case should have been granted. The evidence that the dog had barked at a neighbor did not demonstrate defendant was made aware of the incident and did not demonstrate when the incident occurred: "Even assuming, arguendo, that the dog possessed the requisite vicious propensities, we conclude that defendant met her initial burden on the motion by submitting deposition testimony from herself, her son, and her then boyfriend, which established that defendant lacked actual or constructive knowledge that the dog had any vicious propensities, and plaintiffs failed to raise an issue of fact ... . In opposition to the motion, plaintiffs submitted the affidavit of one of defendant's neighbors, who averred that, on at least two prior occasions, she had seen the dog roaming the neighborhood, and that the dog entered into her backyard and started to bark at her in an aggressive and angry way, thereby putting her in fear that she would be bitten by the dog. The neighbor does not aver that she informed defendant of the two incidents, and thus the affidavit does not raise an issue of fact whether defendant had actual knowledge of the dog's vicious propensities. Furthermore, the neighbor's affidavit does not detail when the two prior incidents occurred, and thus the affidavit does not raise an issue of fact whether defendant had constructive knowledge of the dog's vicious propensities, i.e., that the vicious propensities had 'existed for a sufficient period of time for a reasonable person to discover them' ...". ***Jennifer M.C.-Y. v. Boring*, 2019 N.Y. Slip Op. 05901, Fourth Dept 7-31-19**

CIVIL PROCEDURE, FORECLOSURE, REAL ESTATE.

PLAINTIFF LOAN SERVICING COMPANY WAIVED THE TIME OF THE ESSENCE PROVISION BY ITS RELENTLESS EFFORTS TO PREVENT THE FORECLOSURE SALE TO THE HIGHEST BIDDER (TO EXACT A HIGHER PRICE); THE SANCTIONS IMPOSED ON PLAINTIFF WERE NOT SUPPORTED BY A WRITTEN DECISION AS REQUIRED BY THE CONTROLLING REGULATION; SANCTIONS ASPECT REMITTED.

The Fourth Department determined plaintiff loan company waived the time of the essence provision in this foreclosure sale to the highest bidder, Fox, by its relentless attempts to prevent the sale from going forward (to exact a higher purchase price). The Fourth Department noted that the sanctions imposed upon plaintiff were not supported by a written decision as required by 22 N.Y.C.R.R. § 130-1.1 and remanded for compliance with the regulation: "We reject plaintiff's contention that the court erred in determining that Fox did not breach the time is of the essence clause. It is well settled that '[a] party may waive timely performance even where the parties have agreed that time is of the essence' ... , and that such a waiver may be accomplished by the conduct of a party ... . Here, we agree with the court that plaintiff's relentless attempts to prevent the sale from going forward constituted a waiver of the time is of the essence clause. We also reject plaintiff's further contention that the court erred in determining that plaintiff engaged in frivolous conduct and in imposing sanctions for such conduct. We conclude that plaintiff's conduct was 'completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law[, and was] undertaken primarily to delay or prolong the