IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT E. LEE and MELINDA JO LEE, h/w	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 99-3864
TOTAL QUALITY SERVICES, INC., and MONTGOMERY TANK LINES,	:	
Defendants.	:	

M E M O R A N D U M

BUCKWALTER, J. November 21, 2000

Presently before this Court is a Motion for Summary Judgment on behalf of Plaintiffs, Robert E. Lee and Melinda Jo Lee, a Motion for Summary Judgment on behalf of Defendant, Montgomery Tank Lines ("MTL"), and a Motion for Partial Summary Judgment on behalf of the same defendant. These motions will be addressed individually below.

Plaintiffs brought an action under 3 P.S. § 459-502 (1999) to recover for injuries resulting from a dog bite that Plaintiff received while on the premises owned and allegedly occupied by Defendants, MTL and Total Quality Services ("TQS"). Although Plaintiffs filed a claim against both MTL and TQS, they failed to serve process on TQS within 120 days after filing the complaint. The complaint against TQS will be dismissed pursuant

to Federal Rule of Civil Procedure 4(m). For the reasons set forth below, the Plaintiffs' motion for summary judgment will be denied, and Defendant's motions for summary judgment will be granted. The claim against TQS is dismissed without prejudice.

I. BACKGROUND

Plaintiff was bitten by a dog while conducting business at 159 West Erie Avenue, Philadelphia, PA 19104. Plaintiff sought medical attention for the wound and received a vaccination for rabies. No side effects were noted, and although Plaintiff was hospitalized and diagnosed with Urosepsis E-Coli shortly after this incident, the medical testimony indicates no correlation between the two ailments.

The ownership of the dog is uncertain but evidence exists indicating that an employee of TQS introduced the dog to the premises and permitted it to roam freely. The dog disappeared immediately after its attack on Plaintiff.

At the time of the incident, MTL owned the property and leased it to TQS. Plaintiff alleges in his deposition testimony that he saw MTL tanks on the premises and that he was attacked by the dog while standing at the door to MTL's office. Defendant denies possession, control or occupation of the premises.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all of the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. DeFresne, 676 F.2d 965, 969 (3d Cir. 1982). To the contrary, a mere scintilla of evidence in support of the non-moving party's position will not suffice;

there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that "Rule 56(c)" mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R. Civ. P. 56(c)).

III. DISCUSSION

A. Plaintiffs' Motion for Summary Judgment

Plaintiffs allege in this motion that MTL's ownership of the premises where the tort occurred renders MTL liable as the statutory owner of the dog. Plaintiff, however, improperly draws the conclusion that MTL can be held to control the dog. Under the applicable statute, ownership of the dog requires occupation of the premises, not ownership. See 3 P.S. § 459-102 (1998).[1]

[1] Under this statute, owner is defined as follows:
When applied to the proprietorship of a dog,[owner] includes every person having a right of property in such dog, and every person who keeps or harbors such or has it in his care, and every person who permits such dog to remain on or about any premises occupied by him.

The Third Circuit has held that neither use of a facility nor access to one is a dispositive indicator of possession. See Estate of Zimmerman v. SEPTA, 168 F.3d 680, 685 (3rd Cir. 1999). Additionally, under a negligence analysis, MTL would not necessarily be liable because a landlord who is "out of possession" of a premises is not responsible for tortious conduct that occurs on the premises. Rich v. Kmart Corp., No. 94-6711, 1999 U.S. Dist. LEXIS 7801, at *4-5 (E.D. Pa. May 20, 1999).

In their Motion for Summary Judgment, Plaintiffs fail to provide any evidence establishing MTL's occupation of the premises. Instead, they merely state the conclusion that ownership of the property constitutes occupation. For these reasons, Plaintiffs fail to provide sufficient evidence of MTL's liability, and summary judgment is not appropriate.

B. Defendant's Motion for Summary Judgment

Defendant asserts that although it was the owner of the premises, it neither occupied nor was in possession of the facility at the time of the incident. As explained supra, Plaintiffs must establish that MTL "occupied" the premises or MTL cannot be considered the owner of the dog or be held liable for controlling it.

Plaintiffs only offer their own testimony and observations as evidence that MTL was in possession of the premises. Plaintiffs do highlight a provision in the lease

between MTL and TQS which makes Defendant liable for environmental and waste-related hazards arising from the property. However, Plaintiff mistakenly relies on this clause to illustrate MTL's control over or possession of the facility.[2]

This evidence is insufficient to demonstrate that MTL had possession or control over the land such that MTL "occupied" it as required to establish ownership of the dog. Therefore, Plaintiffs do not meet the burden of proof necessary to survive a motion for summary judgment, and Defendant's motion will be granted.

C. Defendant's Motion for Partial Summary Judgment

Defendant asserts that neither the dog bite nor the rabies vaccination caused Plaintiff's development of Uresepsis E-Coli or resulted in his hospitalization. In their response to this motion for summary judgment, Plaintiffs acknowledged that no causal link existed between the dog bite and the "consequential illness" diagnosed as Uresepsis E-Coli. In light of this response, this claim is moot.

An appropriate order follows.

[2] The Court notes that Plaintiffs fail to mention the more applicable provision which states that TQS indemnifies MTL for all torts or injuries that arise on the premises, suggesting TQS's control over the premises at the time of the tortious conduct.

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O R D E R

AND NOW, this 21st day of November, 2000, upon consideration of Plaintiffs' Motion for Summary Judgment (Docket No. 7) and Defendants' response thereto (Docket No. 11) and Defendants' motions for summary judgment and partial summary judgment (Docket Nos. 8, 12) and Plaintiffs' responses thereto (9, this motion was inadvertently not docketed by the clerk's office), it is hereby ORDERED that:

1. Plaintiffs' Motion for Summary Judgment is DENIED.

2. Defendants' Motion for Summary Judgment is GRANTED.

3. Defendants' Motion for Partial Summary Judgment is DISMISSED as MOOT.

As to the claim against Total Quality Services, Inc., the claim is DISMISSED without prejudice.

This case is CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.