Colley v Renner
2007 NY Slip Op 30144(U)
March 5, 2007
Supreme Court, Suffolk County
Docket Number: 0020190
Judge: Robert W. Doyle
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 04-20190
CAL. No. 06-00940-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8/10/06
ADJ. DATE 9/21/06
Mot. Seq. # 002 - MG; CASEDISP

--X
BRENDAN COLLEY,

Plaintiff,

- against -

THOMAS RENNER and NINA RENNER,

Defendants.
--X

DAVIS & HERSH, LLP
Attorneys for Plaintiff
1345 Motor Parkway
Islandia, New York 11749

PURCELL & INGRAO, P.C.
Attorneys for Defendants
204 Willis Avenue
Mineola, New York 11501

Upon the following papers numbered 1 to 19 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 17; Replying Affidavits and supporting papers 18 - 19; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants, Thomas Renner and Nina Renner ("defendants"), for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Brendan Colley, on September 11, 2002, as a result of an incident which occurred on defendants' property in Centerport, New York, when plaintiff, a Suffolk County police officer, in the course of responding to a dispatcher call at defendants' premises, encountered defendant's dog, "Jenna." Plaintiff, startled by the dog, jumped over the chainlink fence bordering defendant's property and punctured his hands on the twisted metal knots at the top of the fence. Defendants' dog never made contact with the plaintiff.

Defendants Renner now move for summary judgment on the basis that plaintiff cannot establish a prima facie case of negligence against defendants under General Municipal Law § 205-e. Defendants also assert that they were unaware of any vicious propensities on behalf of their dog. In support, defendants submit the pleadings and copies of the deposition transcripts of the plaintiff and defendants.

Plaintiff opposes the motion on the grounds that an issue of fact exists as to whether defendants should have warned Officer Colley of Jenna's presence by placing a "Beware of Dog" sign on their property. Plaintiff also contends that defendants' violation of the Suffolk County Code precipitated the plaintiff's injuries. In opposition, plaintiff submits copies of the deposition transcript of plaintiff and defendants and copies of Suffolk County Code, Article 3, Sections 213-3 and 213-4c.

At his examination before trial plaintiff Colley testified to the effect that he is employed by the Suffolk County Police Department, assigned to the Second Precinct, and was still in his probationary period when his accident occurred. Mr. Colley stated that on the evening of his accident, he was assigned to patrol the area of Centerport and part of Huntington. Mr. Colley testified that he received a phone call from his dispatcher regarding an alarm sounding at a house in Centerport and upon his arrival at the home he realized the alarm siren was coming from inside the home. He then stated that he checked the front of the house and the perimeter looking for breaks in the windows or open doors. Plaintiff testified that he did not knock on the front door because he was trained to avoid doing so for his own safety in case a burglary was in progress. He explained that he then proceeded through the front gate on the left side of the house toward the back of the house to check for any breaks in the windows or doors. Mr. Colley stated that while walking down the 10 to 15 foot pathway, he turned to go around the corner of the house, he was greeted by a large dog. He stated the dog was loose in the yard, weighed about 50 to 60 pounds, was dark in color and stood approximately waist-level with him. Mr. Colley then testified that the dog "lunged" at him, with its mouth open, but did not make contact with him although the dog came fairly close to him, approximately four feet. Plaintiff stated because the alarm was ringing in the background, he was unsure as to whether the dog growled or barked at him. Mr. Colley stated that he jumped over the chainlink fence on his left, landing on his back. Plaintiff then stated the dog remained at the fence barking at him. Mr. Colley explained that his hands were punctured when he jumped over the chainlink fence, which was approximately four to five feet tall. Plaintiff explained that the fence contained spikes that protruded about one to two inches above the fence's bar. He stated that afterward he tried to phone his dispatcher but was unable to do so because of poor reception, so he proceeded towards the house. Mr. Colley testified that the homeowner provided him with assistance and phoned his dispatcher. Plaintiff testified that he followed the training he had received on responding to calls when alarms are ringing. He also stated that he did not receive training regarding approaching homes where a dog was present or how to defend himself against dogs. Mr. Colley explained that on prior occasions when a dog was present at the gate, he would not enter, but would have his dispatcher contact someone in the home to come restrain the dog before he proceeded with his inspection. He testified that his police gun belt was equipped with pepper spray and he never called out to anyone as he approached the backyard nor did he see anyone in the backyard. Mr. Colley then stated that he had never received any complaints regarding the subject dog and he had never been to the defendants' premises prior to the night of his accident. He further testified that the dog never exited the fence.

At his examination before trial defendant, Thomas Renner, testified, in pertinent part, that on the date of the subject accident his family owned a mixed breed dog named Jenna that weighed approximately 90 pounds and stood about two feet tall. Mr. Renner stated that Jenna has a a sweet and affectionate temperament and is well-behaved. He also testified that he has never seen Jenna bite or jump on anyone. He also explained that when someone comes to the home, Jenna will either nudge them with her nose, wag her tail or ignore them. Mr. Renner also stated that he has never witnessed

Jenna interacting with someone wearing a uniform but he has never received any complaints from any of the workmen that have come to the home nor has anyone ever complained about Jenna. He testified that his informed him of the incident because he was not home when the incident occurred. Mr. Renner explained that they have only had one other false alarm and they have never received any tickets or summons for false alarms. He then stated that there are no beware of dog signs on their property but if someone comes onto their property Jenna will bark to alert them. Mr. Renner testified that Jenna takes medication for a hypothyroid problem and a bad back. Defendant also stated that Jenna does not normally stand on her hind legs because she is arthritic, although she used to when she was younger. He stated that the chainlink fence on the south side of his house is about four feet high and is made of metal with sharp twisted bunches on the top. Mr. Renner further testified that Jenna has never run away or jumped the fence.

Defendant Nina Renner at her examination before trial testified, in pertinent part, that her family adopted Jenna, a Labrador mix breed, from their family veterinarian when she was eight months old. Mrs. Renner stated that Jenna is 10 years old, licensed, weighs approximately 90 pounds, brindle in color, and has her rabies tags. She testified that Jenna has a playful, affectionate disposition, is very good with children and people in general. Mrs. Renner then testified that Jenna is not a guard dog, but has gone to obedience school and won awards for her behavior. Defendant stated that Jenna greets strangers by wagging her tail or nudging them with her nose. She stated she does not remember Jenna ever running away or biting anyone. She also explained that Jenna takes medication for hypothyroidism and does not like to have her paws placed on anyone's chest. Mrs. Renner testified that because Jenna is fenced in, she is allowed to roam freely in the backyard and spends about 15 minutes outside four times a day. Defendant stated that their property is the corner lot and is surrounded by a mixed array of fences, including their south side neighbor's four foot chainlink fence. She also stated that she has never seen Jenna jump over the chainlink fence and their neighbors have never complained about Jenna. Mrs. Renner testified that on the night of the plaintiff's accident, she and her daughter had just arrived home and heard the home alarm sounding. She also stated that she was unaware of anyone else's presence on the property. Defendant testified she immediately put Jenna in the backyard and tried to enter the security code to stop the alarm, but it was non-responsive. She stated she called the security company for assistance, not the police, but did not know if the security company phoned the police department. Mrs. Renner testified that her first awareness of the officer's presence was when he rang her doorbell while she was on the phone with the security company. She stated upon opening the door, she noticed the officer was bleeding from his hand. Mrs. Renner testified the officer did not immediately say anything about her dog, but requested that she dial a phone number for him. She then stated that upon further inquiry the officer informed her that her dog had come after him. Mrs. Renner stated while the officer remained standing on her front stoop, refusing to enter the home, Jenna remained in the backyard. She testified that about four police cars arrived to escort the officer from her premises. Defendant stated she inquired as to what would happen to her dog and was informed by one of the other officers that her dog had not bitten the officer, the officer had gotten scared and he was not sure how the officer had gotten into her backyard. Mrs. Renner further testified that she does not recall having to coax Jenna out of the house into the backyard and she did not observe in any changes in Jenna's temperament.

General Municipal Law § 205-e provides injured police officers with a cause of action where a negligent defendant's violation of a statute or ordinance is the direct or indirect result of the injuries

sustained by the officer. It has further been determined that General Municipal Law § 205-e is to be interpreted broadly and applied expansively (***Gonzalez v Iocovello***, 93 NY2d 539, 693 NYS2d 486 [1999]); therefore, so long as a statute contains either a particularized mandate or a clear legal duty and is a part of a well-developed body of law and regulation, either of these objective standards will suffice and the statute will serve as a predicate (***Gonzalez v Iocovello,*** *supra*; ***Desmond v City of New York***, 88 NY2d 455, 646 NYS2d 492 [1996]). Therefore, in order to establish a prima facie case under General Municipal Law § 205-e, the plaintiff must [1] identify the statute or ordinance that the defendant failed to comply with; [2] describe the manner in which the police officer was injured; and [3] set forth sufficient facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the police officer (***Williams v City of New York***, 2 NY3d 352, 779 NYS2d 449 [2004]; ***Fahey v Serotta***, 23 AD3d 335, 806 NYS2d 70 [2005]; ***Acosta v Trinity Lutheran Church***, __ Misc3d __, 2006 NY Slip Op 5121U, 2006 NY Misc LEXIS 1663 [2006]). Moreover, the plaintiff is not required to establish the same proximate causal connection between the alleged statutory violation and the plaintiff's injuries, thereby making a violation one of "strict" liability (***Lusenskas v Axelrod***, 183 AD2d 244, 592 NYS2d 685 [1992]).

Here, the defendants have demonstrated that the broad recovery rights conferred upon police officers under General Municipal Law § 205-e does not encompass the plaintiff's claim that his injuries occurred as a result of the defendants' alleged statutory violation (***Cosgriff v City of New York***, 241 AD2d 382, 659 NYS2d 888 [1997]; ***Capuano v Platzner Int'l Group, Ltd.***, *supra*). Defendants have established that the sections of the Suffolk County Code relied upon by the plaintiff do not impose an affirmative and clearly-articulated legal duty upon the owners of dogs or alarm systems and thus may not serve as a predicate for a claim brought under General Municipal Law § 205-e (*see*, Suffolk County Code Article 3 §§ 213-3 and 213-4c; ***Gonzalez v Iocovello***, *supra*; ***Desmond v City of New York***, *supra*). Section 213-4c of the Suffolk County Code makes it a violation for a person to have an alarm system that directly dials the Suffolk County Police Department; here there is no evidence of the defendants' alarm system having directly dialed the police department or that it would not have stopped within 60 minutes of having sounded its alarm. Mrs. Renner specifically testified that she did not call the police and was unaware of any police presence until the officer showed up on her doorstep bleeding. There is no evidence that the alarm was still ringing while the officer awaited assistance at the defendants' door for approximately 15 minutes, nor does the evidence establish that the defendants were issued any citations, summons or tickets for false alarms. Thus it cannot be said that the subject section of the Suffolk County Code is applicable in the instant matter. In addition, Section 213-3 is also inapplicable to the subject matter. Section 213-3 requires a judicial determination of a dog's being dangerous before it can be treated as such, and here that requisite element is lacking.

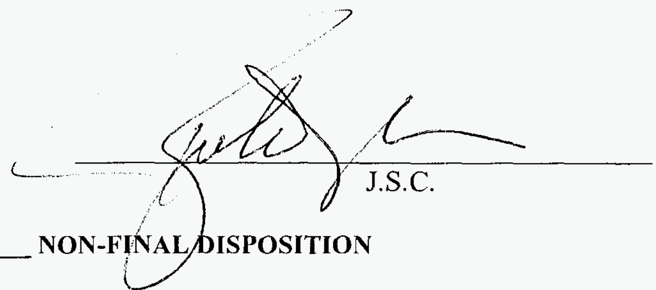
In order to establish a prima facie case for an injury caused by a domestic animal, the plaintiff must demonstrate not only that the animal had vicious propensities but that the owner knew of the animal's vicious propensities (***Tessiero v Conrad***, 186 AD2d 330 [1992]; *see also,* ***Collier v Zambito***, 1 NY3d 444, 775 NYS2d 205 [2004]; ***Mindel v Jones***, 16 AD2d 857, 791 NYS2d 692 [2005]; ***Beljean v Maiuzzo***, 256 AD2d 533, 683 NYS2d 104 [1998]; *see also,* Restatement [Second] of Torts §§ 509, 518) "or that they existed for a such a period of time that the reasonably prudent person would have discovered them" (***Appel v Charles Heinsohn, Inc.***, 92 AD2d 1029, 458 NYS2d 618 [1983]; *see also,* ***Brophy v Columbia County Agric. Socy.***, 116 AD2d 873, 498 AD2d 193 [1986]). Vicious propensities include "the propensity to do any act that might endanger the safety of the persons and property of

others in a given situation" (***Collier v Zambito***, *supra*; *see also*, ***Lagoda v Dorr***, 28 AD2d 208, 284 NYS2d 130 [1967]). Knowledge on behalf of the owner may be demonstrated by presenting proof of prior acts of a similar nature of which the defendant had notice (***Collier v Zambito***, *supra*). A plaintiff may also establish knowledge by presenting evidence that the animal has a proclivity to act in such a vicious manner by showing that the animal has been known to growl, snap or bare its teeth, aggressively barking when the animal's area is invaded, whether the owner restrained the animal and the manner in which it was restrained (***Bard v Jahnke***, 6 NY3d 592, 815 NYS2d 16 [2006]; ***Mindel v Jones***, *supra*; ***Snyder v Nat'l Parking Sys.***, 5 Misc3d 1010A, 798 NYS2d 713 [2004]). Vicious propensities, however, are not established solely by the fact that a dog is confined, or the severity of the attack on the plaintiff, or the violent tendencies of the breed (***Sers v Manasia***, 280 AD2d 539, 720 NYS2d 192 [2001]; *see also*, ***Lugo v Angle of Green, Inc.***, 268 AD2d 567, 702 NYS2d 608 [2000]; ***Althoff v Lefebvre***, 240 AD2d 604, 658 NYS2d 695 [1997]; ***De Vaul v Carvigo, Inc.***, 138 AD2d 669, 526 NYS2d 483 [1988]).

Defendants have also shown that Jenna has not displayed any prior aggressiveness so as to put them on notice of the dog's vicious propensity, and plaintiff has failed to rebut that showing with sufficient evidence (***Bard v Jahnke***, *supra*; ***Mindel v Jones***; *supra*; ***Tessiero v Conrad***; *supra*; ***Williams v City of New York***, *supra*). The defendants have established that Jenna is basically a house dog that has never bitten anyone and has received obedience training, as well as won awards for her obedience. Therefore, actual knowledge of the dog's vicious propensities due to a prior aggressive act of a similar nature may not be asserted against the defendants (***Morse v Colombo***, 8 AD3d 808, 777 NYS2d 824 [2004]; ***Lagoda v Dorr***, *supra*). The defendants also testified that Jenna did not receive any guard dog training; therefore, the owner's knowledge of a vicious propensity by the animal may not be inferred (***Collier v Zambito***, *supra*; ***Williams v City of New York***, *supra*; ***Snyder v Nat'l Parking Sys.***, *supra*). Consequently, the plaintiff's complaint must also be dismissed on this ground as well.

Accordingly, defendants' motion for summary judgment is granted.

Dated: MAR 0 5 2007



J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**