

**Maclachlan v Taylor**

2007 NY Slip Op 30791(U)

March 26, 2007

Supreme Court, Suffolk County

Docket Number: 0027793/2004

Judge: Robert W. Doyle

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

**PRESENT:**

Hon ROBERT W. DOYLE  
Justice of the Supreme Court

MOTION DATE 10/2/06  
ADJ. DATE 12/4/06  
Mot. Seq. # 002 - MD

-----X		
DYLAN W. MACLACHLAN, an infant, by his	:	TINARI O'CONNELL OSBORN & KAUFMAN
father and natural guardian, KEVIN MACLACHLAN,:	:	Attorneys for Plaintiffs
and KEVIN MACLACHLAN, individually,	:	320 Carleton Avenue, Suite 6800
	:	Central Islip, New York 11722
	:	
Plaintiffs,	:	DeSENA & SWEENEY, LLP
	:	Attorneys for Defendants
- against -	:	1383 Veterans Memorial Hwy., Suite 32
	:	Hauppauge, New York 11788
ROBERT TAYLOR and KIMBERLY TAYLOR,	:	
	:	
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 22 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 13 - 18; Replying Affidavits and supporting papers 19 - 21; Other 12 (defendants' memorandum of law); 22 (defendants' reply memorandum of law); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendants, Robert Taylor and Kimberly Taylor, for an order pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint is denied.

Plaintiff Kevin Maclachlan commenced this action, individually and on behalf of his infant son, Dylan Maclachlan ("Dylan"), to recover damages for personal injuries allegedly sustained by the infant-plaintiff on June 22, 2003, as a result of a dog attack that occurred at the defendants' home, located at 24 Sunbonnet Lane, Bellport, County of Suffolk, New York.

Defendants now move for summary judgment on the basis that they did not have any knowledge of any prior vicious propensities by their dog, nor did they breach any duty owed to the infant-plaintiff. Defendants submit the pleadings, copies of the deposition transcripts of plaintiff Kevin Maclachlan and defendant Robert Taylor.

Plaintiffs oppose defendants' motion on the ground that there is a triable issue of fact regarding defendant Kimberly Taylor's knowledge of the dog's vicious propensities. Plaintiffs submit affidavits of Albert Hyde and plaintiff Kevin Maclachlan and copies of the deposition transcript of the infant-plaintiff and defendant Kimberly Taylor.

Plaintiff Kevin Maclachlan testified at his examination before trial that at the time of the accident his son, Dylan Maclachlan ("Dylan") was two years old and his family was at his sister Kimberly Taylor's house for a barbeque. Mr. Maclachlan stated that him and his family were frequent visitors to the defendants' home. He stated that his son Dylan had interacted with the Taylors' 100-pound Rottweiler dog named Neko on many occasions prior to the dog biting Dylan and he had never requested that the dog be kept away from his children. Mr. Maclachlan testified that Neko would bark when anyone first came to the house because "that is what dogs do." He also stated that he never saw the dog bite anyone but after his son's attack, he was informed that the dog had previously bitten an employee of his sister's husband on the ankle when the man came to perform yard work at the home. Mr. Maclachlan testified that he was on the deck in the backyard with his sister when his niece brought Dylan to him after Dylan was attacked by the dog. He stated the attack occurred in the hallway of his sister's home while the children, including Dylan, were feeding Neko dog biscuits. He explained that the dog jumped on Dylan, biting his throat and chin, knocking him into the corner of the wall, cutting the back of Dylan's head. Mr. Maclachlan further testified that the dog usually, including the day of the accident, roamed freely about the home, was active and energetic.

Defendant Robert Taylor testified at his examination before trial that he had moved out of the home on November 30, 2002, because he and defendant Kimberly Taylor were in the process of getting a divorce, and he was not present on the day of the incident but was later informed by his youngest daughter that the dog had bitten Dylan. Mr. Taylor stated that his middle daughter told him that Dylan had attempted to take the bone from Neko and the dog growled at him but when Dylan tried to take the bone from the dog the second time the dog snapped at him and bit him. Mr. Taylor stated that his family had received Neko as a gift from the next door neighbor when Neko was approximately six or seven weeks old. He stated that he had never heard of or seen Neko bite anyone and that Neko was given free reign of the house and the fenced-in backyard. Mr. Taylor testified that he had placed two "Beware of Dog" signs on the property because he was informed by someone that he had to since Neko was a big dog. He also stated that Neko had a good disposition and only received informal obedience training from his owners. Mr. Taylor further testified that as part of Neko's training as a puppy he would occasionally take Neko's food away from him and he never witnessed Neko snap or growl at any of the children when they would take his food away.

The infant-plaintiff Dylan Maclachlan testified at his examination before trial that on the day of the incident he was at his Aunt Kim's house and he was playing inside the house with his cousin Ryan and his sister Jessica. Dylan stated that he had never played with Neko prior to the day of his incident because Neko was a bad dog. Dylan testified that Neko never growled or bit him before the day of his accident. Dylan stated that he was not playing with Neko when Neko attacked him but he was feeding Neko doggy biscuits from a bag. Dylan stated that he was standing approximately six feet from Neko throwing the dog biscuits at Neko when Neko walked over to him, growled and bit him causing him to hit his head against the wall.

The affidavit of Albert Hyde indicated that he is an employee of Paul Verricelli, the husband of defendant Kimberly Taylor. Mr. Hyde stated that approximately one month before the subject incident, he and Sal Flores were doing yard work at the defendant's residence when they were set upon by the defendant's dog, Neko. Mr. Hyde explained that Neko began growling and then lunged at them, almost biting Mr. Flores in the face. Mr. Hyde then stated that the of them ran behind the fence to get away from the dog and the dog continued chasing them while growling and trying to bite them. Mr. Hyde stated that Mr. Flores then went inside and informed Mrs. Taylor about the dog's attack on them. Mr. Hyde further explained that Mr. Flores used to live in Amityville but has since returned to Mexico.

Defendant Kimberly Taylor testified at her examination before trial that she owned a Rottweiler named Neko on the date of the subject incident and had never witnessed him bit or jump on anyone. Mrs. Taylor stated no restrictions were placed on her children or any of the children visiting her home with regards to their interactions with Neko. She explained that the dog would growl when people would come to the front door but would stop after the person was let into the home. She stated that on the day of the subject incident she was having a barbeque at her home and there were approximately 25 people, including her brother Kevin Maclachlan and his family. She explained that she placed Neko in her bedroom at approximately 3:00 pm when it was time to serve the food because he was "being a nuisance" while people were eating. Mrs. Taylor explained that after an hour, she informed her boyfriend, Paul Verricelli, to let Neko out of the bedroom because he was barking. She stated that she did not see Neko after he was let out of the bedroom nor was she aware of his temperament. Mrs. Taylor explained that she became aware of Neko biting Dylan when her daughter, Brianna, brought Dylan out into the backyard. Mrs. Taylor testified that Brianna informed her that the "kids were feeding Neko doggy bones, Dylan pet the dog, the dog growled, Brianna told Dylan to step away and the dog jumped up and bit him, knocking him backwards" against the dining room wall. Mrs. Taylor further testified that she was unaware of any dog bite incident involving Mr. Flores, who was at her home occasionally along with Mr. Hyde to work on her yard.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see, Alvarez v Prospect Hospital*, 68 NY2d 320 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]).

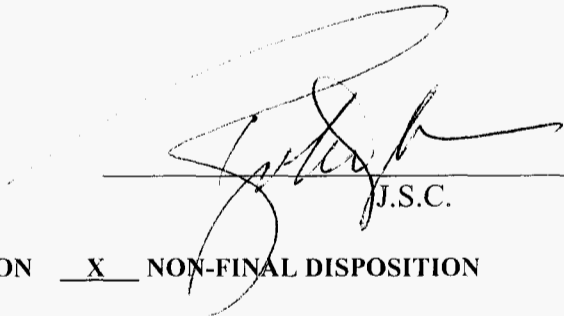
The owner of a domestic animal will be held liable for harm caused by that animal if the owner knew or should have known of that animal's vicious propensities (*Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]; *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205 [2005]; *Fragiacomo v Parrilla*, 12 AD3d 483, 784 NYS2d 646 [2004]; *see also*, Restatement [Second] of Torts §§ 509, 518). Vicious propensities include the propensity to do any act that might endanger the safety of persons or others' property in a particular situation (*Collier v Zambito, supra; see also, Morse v Colombo*, 8 AD3d 808, 777 NYS2d 824 [2004]; *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 and that proclivity results in the occurrence of an injury (*Collier v Zambito, supra; Bailey v Veitch*, 2006 NY Slip Op, \_\_ AD3d \_\_, 814 NYS2d 459, 2006 NY App Div LEXIS 5048 [2006]). A defendant may also be held liable for injury caused by a domestic animal where, although not vicious, the animal causes injuries that were reasonably foreseeable (*Faller v Schwartz*, 303 AD2d 624, 756 NYS2d 641 [2003]; *Colarusso v Dunn*, 286 AD2d 37, 732 NYS2d 424 [2001]; *McCullough v Maurer*, 268 AD2d 569, 702 NYS2d 622 [2000]). 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 Vault v Carvigo, Inc.*, 138 AD2d 669, 526 NYS2d 483 [1988]).

Here, defendants have not met their burden in establishing their entitlement to judgment as a matter of law (*Zuckerman v City of New York, supra; Lugo v Angle of Green, Inc., supra*). Questions of fact have been raised as to whether or not the defendants were aware of Neko, the Rottweiler's vicious propensities (*Saboe v Splish Splash at Adventure Land*, 272 AD2d 315, 707 NYS2d 876 [2000]; *Coon v Holmes*, 253 AD2d 731, 677 NYS2d 800 [1998]). The attack on the infant-plaintiff was a sudden, unprovoked and unexpected outburst of viciousness, which left the infant-plaintiff bleeding from his throat, chin and the back of his head (*see, Collier v Zambito, supra; Wilson v Livingston*, 305 AD2d 585, 762 NYS2d 408 [2003]; *Lynch v Naciewicz*, 126 AD2d 708, 511 NYS2d 121 [1987]). Although it is true that the courts have never held that a particular breed of dog is dangerous, thereby charging the owner with knowledge of a vicious propensity, the courts have also never held that every animal is entitled to one free bite (*Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]; *Collier v Zambito, supra; Malpezzi v Ryan*, \_\_ AD3d \_\_, 2006 NY Slip Op 3138, 815 NYS2d 295, 2006 NY App Div LEXIS 4971 [2006]). In addition, evidence has been received regarding the animal having chased and attempting to bit workmen on the defendants' premises prior to the incident involving the infant-plaintiff. Consequently, questions of fact have been raised regarding whether defendants were aware of the dog's viciousness (*Parente v Chavez*, 17 AD3d 648, 793 NYS2d 517 [2005]; *Lynch v Naciewicz, supra; Lagoda v Dorr*, 28 AD2d 208, 284 NYS2d 130 [1967]).

Accordingly, defendants' motion for summary judgment is denied.

Dated:           MAR 26 2007          

  
\_\_\_\_\_  
J.S.C.

           FINAL DISPOSITION      X   NON-FINAL DISPOSITION