

Mingo v Vasquez

2007 NY Slip Op 30901(U)

April 19, 2007

Supreme Court, Suffolk County

Docket Number: 0017495/2005

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 12-29-06
ADJ. DATE 1-12-07
Mot. Seq. # 001- MG; CASEDISP

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MARK MINGO, an infant under the age of 18	: LITE & RUSSELL
years by his mother and natural guardian, ARIA	: Attorneys for Plaintiff
MINGO,	: 212 Higbie Lane
Plaintiff,	: West Islip, New York 11795
	: :
- against -	: BORDA, KENNEDY, ALSEN &
	: GOLD, LLP
RAMON VASQUEZ and RAFAELA VASQUEZ,	: Attorneys for Defendants
	: 1805 Fifth Avenue
Defendants.	: Bay Shore, New York 11706
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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 defendants, Ramon Vasquez and Rafaela Vasquez, for an order pursuant to CPLR 3212, granting them summary judgment dismissing the plaintiff's complaint is granted.

Plaintiff, Aria Mingo, commenced this action, both personally and on behalf of the infant plaintiff, Mark Mingo ("Mark"), for injuries he allegedly sustained after being attacked by defendants' two dogs while on the defendants' premises, located at 100 Brushwood Drive, Shirley, County of Suffolk, New York.

On April 6, 2005, the infant plaintiff, then approximately seven years old, was in the street playing "tag" with his friend, Damien, while a group of teenage boys were playing basketball using his friend's basketball hoop. During the course of playing basketball, the basketball went over the defendants' six foot wooden fence. At an examination before trial, Mark testified that one of the older boys told him to "go get the ball" and when he responded "no," the older boy "grabbed him, forcefully picking him up, against his will, while one of the other boys held his feet and they "threw" him over into

the defendants' backyard. Mark then testified that when he landed in the backyard, he landed on his buttocks, "banging" his leg against the fence and upon looking up he saw the basketball, which was by the pool, and two dogs running towards him. Mark explained that he attempted to climb back over the fence but the Pit Bull grabbed him by his leg, pulling him off the fence, while the Corgie-mix breed dog ripped his underpants off and bit him in the buttocks. Mark stated that it was not until one of the older boys named Adam, threw another ball over the fence that the dogs released him and Adam was able to lift him up and over the fence.

Defendants testified at an examination before trial that at the time of the incident, they owned a Pit Bull named "Peaches" and a Corgie- mix breed dog named "Fluffy". Mrs. Vasquez also testified that they received the Pit Bull from a friend of her husband when the dog was 3 months old and they found the Corgie-mix breed on their property when they first moved into the house in 2000. Defendants testified that both dogs were kept in their backyard and would only come into the basement of the house. Defendants also stated that although the dogs were never around visitors or children, except for their son, it was not because the dogs were vicious, but because the children always stayed inside playing video games with their son. Both defendants testified that neither dog had ever exhibited any aggressive behavior nor had they ever bitten anyone prior to the infant plaintiff being bitten.

Defendants now move for summary judgment on the basis that the defendants were not negligent in the control, maintenance and care of their dogs. The defendants also contend that they had no prior indications regarding any vicious propensities on behalf of their dogs. Defendant submits, the pleadings and copies of the deposition transcripts of plaintiffs and defendants.

Plaintiffs oppose defendants' motion on the grounds that there are questions of fact regarding defendants knowledge of their dogs vicious propensities prior to the infant plaintiff's injury and the defendants maintenance, care and control of their dogs. Plaintiffs submit copies of the deposition transcripts of plaintiffs and defendants.

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]).

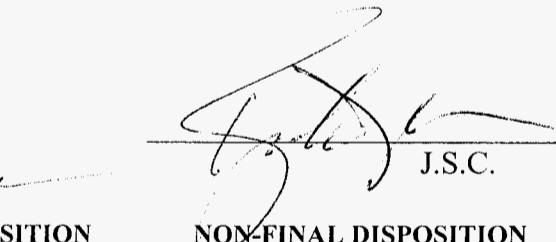
An owner of a domestic animal will be held liable for injuries caused by that animal where it is demonstrated that the animal had vicious propensities, which includes the propensity to do "any act that might endanger the safety of the persons or property of others in a given situation" (*Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205 [2004]; *quoting Dickson v McCoy*, 39 NY 400 [1868]), and the owner knew of the animal's vicious propensities (*Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]; *Collier v Zambito, supra*; *Tessiero v Conrad*, 186 AD2d 330 [1992]; *see also, 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). Proof of a vicious propensity may be demonstrated by

showing defendant’s awareness of a prior vicious act or that the animal had the proclivity to act in such a vicious manner (*Mindel v Jones, supra; Lagoda v Dorr*, 28 AD2d 208, 284 NYS2d 130 [1967]). However, vicious propensity is not established solely by the violent tendencies of a breed, the fact that the animal is confined or the severity of the attack on the plaintiff (*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]).

In this case, the defendants have demonstrated their entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra*). Although the courts have never held that every animal is entitled to one free bite, there is no proof that either “Peaches” or “Fluffy” possessed vicious propensities, except that the infant plaintiff was attacked after being thrown over the fence into the defendants’ backyard where the dogs were kept (*Bard v Jahnke, supra*). Plaintiffs’ evidence is also simply insufficient to raise an issue of fact regarding the defendants awareness of their animals vicious propensities (*Collier v Zambito, supra*). Although plaintiffs seek to raise an issue of fact by asserting that the defendants were negligent for failing to inquire whether Peaches had bitten anyone before they received her, this assertion does not equate negligence since defendants obtained Peaches when she was 3 months old and never had any problems with her biting anyone prior to the infant plaintiff’s incident. Moreover, no testimony has been adduced to show that the defendants allowed their animals to roam the neighborhood freely or that there were complaints made against them. In fact, the plaintiffs, who were relatively new to the neighborhood, testified that they were unaware of the fact that there were dogs that lived on the defendants’ property and they had no knowledge of the animals having previously attacked anyone. Nor was it foreseeable by the defendants that a seven year old child would be “thrown” into their backyard to retrieve a ball that had gone over their six foot wooden fence (*see, Colarusso v Dunne*, 286 AD2d 37, 732 NYS2d 424 [2001]; *Silva v Micelli*, 178 AD2d 521, 577 NYS2d 444 [1991]). Regardless of whether or not a “Beware of Dog” sign may have been posted on the front gate but not the back gate, that alone does not establish that the defendants were aware of their dogs’ vicious propensities or that their dogs had a proclivity to act in a vicious manner or that it was a substantial cause of the plaintiff’s injuries (*Lugo v Angle of Green, Inc., supra; Williams v City of New York*, 306 AD2d 203, 761 NYS2d 221 [2003]).

Accordingly, the defendants’ motion for summary judgment is granted.

Dated: APR 19 2007



J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION