

**Goulding v Knight**

2007 NY Slip Op 31464(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0007468/2005

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 2-7-07  
ADJ. DATE 3-8-07  
Mot. Seq. # 002 - MG; CASEDISP

-----X  
DAWN GOULDING, :  
 :  
 : Plaintiff, :  
 :  
 : - against - :  
 :  
 PATRICIA KNIGHT, :  
 :  
 : Defendant. :  
-----X

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-----X  
PATRICIA KNIGHT, :  
 :  
 : Third-Party Plaintiff, :  
 :  
 : - against - :  
 :  
 CVS CORPORATION, :  
 :  
 : Third-Party Defendant. :  
-----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 - 13; Notice of Cross Motion and supporting papers       ; Answering Affidavits and supporting papers 14 - 20; Replying Affidavits and supporting papers 21 - 22; Other       ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that this motion by defendant, Patricia Knight, for an order pursuant to CPLR 3212, granting her summary judgment dismissing plaintiff's complaint is granted.

Plaintiff, Dawn Goulding, has commenced an action seeking damages for injuries that she allegedly sustained as a result of being attacked by the defendant's Yorkshire Terrier dog, "Socrates". On August 9, 2004, defendant was standing in the pharmacy line at a local CVS store, located at 15

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West Main Street, East Islip, County of Suffolk, New York, holding her dog, Socrates. Defendant's dog, Socrates, jumped up and out of the defendant's arms and bit the plaintiff on her lip when the plaintiff attempted to pass behind the defendant. Plaintiff was caused to sustain serious injuries.

Defendant now moves for summary judgment on the basis that she did not have prior notice of her dog's vicious propensities because he had never bitten anyone before the incident with the plaintiff. Defendant also asserts that her dog had been in several retail facilities without any accidents occurring. Defendant, submits, the pleadings, copies of the deposition transcripts of plaintiff and defendant.

Plaintiff opposes the instant motion on the grounds that the defendant violated the Health Law by bringing her dog into the CVS store and ignored requests to leave the store with her dog. Plaintiff also contends that the defendant was aware of her dog's vicious propensities. Plaintiff, submits, copies of the deposition transcripts of plaintiff, defendant and non-party witness, Michael O'Neill and literature on Yorkshire Terriers.

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. Ctr.*, 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]). In addition to proof of a prior similar vicious act, the fact that the dog has been known to "growl, snap or bare its teeth" or "the manner in which the dog is restrained by its owner" are examples of evidence that may be sufficient to raise a triable issue of fact regarding the defendant's knowledge of its animal's vicious propensity (*Collier v Zambito, supra*; *Czarnecki v Welch*, 13 AD3d 952, 786 NYS2d 659 [2004]; *Morse v Colombo*, 8 AD3d 808, 777 NYS2d 824 [2004]). 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 Vaul v Carvigo, Inc.*, 138 AD2d 669, 526 NYS2d 483 [1988]).

Plaintiff testified at her examination before trial that on the date of the accident she was employed at the West Main Street CVS store as a pharmacy technician and inventory specialist. Ms. Goulding stated that she was behind the pharmaceutical counter filling prescriptions the first time she saw the defendant, approximately 8 to 10 minutes before the accident occurred. She stated that Mrs. Knight was cradling a charcoal colored Yorkshire Terrier, that weighed about 7 to 10 pounds, in her arms at her chest level. Plaintiff testified that the manager of the store informed Mrs. Knight that dogs were not allowed in the store and asked Mrs. Knight to leave the store, but the defendant continued to browse the aisles of the store. Plaintiff stated that the defendant then walked over to the pharmacy counter and once again was asked by the manager to leave the store. Ms. Goulding then testified that she came from behind the pharmacy counter heading to the restroom and while passing Mrs. Knight, the dog leapt up and out of Mrs. Knight's arms and bit plaintiff's lip. Ms. Goulding testified that after the dog began its attack, and while it was still hanging from her lip, Mrs. Knight grabbed the dog and started screaming she was so sorry. Plaintiff stated that the dog did not bark before he bit her. Ms. Goulding stated that after the incident, the defendant took the dog outside and apologized once again to the plaintiff. Plaintiff further testified that there is a sign posted on the front door of the CVS store stating dogs are not allowed in the store.

Defendant testified at an examination before trial that she owned a silver two year old Yorkshire Terrier, named Socrates and he weighed approximately 16 pounds. She stated that Socrates had not received guard dog training or training on aiding handicap persons. She testified that she had never been to the subject CVS store before the incident and although she noticed papers on the store's front door, she did not see any signs stating no dogs were allowed in the store. Mrs. Knight stated that she bought her dog inside of store because it was 90 degrees outside and too hot for him to stay in the car. Mrs. Knight stated that the accident occurred on her second trip inside the store. She stated that her dog was on a leash but she was carrying him in her arms. Mrs. Knight stated Socrates never barked while he was in the store and no one ever told her to remove the dog from the store, in fact the Pharmacist said Socrates was a "very cute dog". Mrs. Knight stated that she was waiting in line at the pharmacy counter to pick up her prescription that she had left earlier that morning and the plaintiff was standing in line behind her. Mrs. Knight testified that Ms. Goulding was talking to Socrates and his head was resting above her shoulder. Defendant then stated she heard the plaintiff say "ooh" and when she turned around she saw the plaintiff holding her mouth. She stated she also observed blood coming from the plaintiff's mouth. Defendant testified she inquired as to what happened and Ms. Goulding told her "she was petting him and the dog licked her and then bit her." Mrs. Knight stated that she did not see her dog bite the plaintiff and that Socrates never moved from her arms. Mrs. Knight testified that after the incident, a woman came over to her and said that she probably should not have had the dog in the store. Mrs. Knight further testified that she has taken Socrates into other retail stores and restaurants and he has never bitten anyone prior to biting the plaintiff.

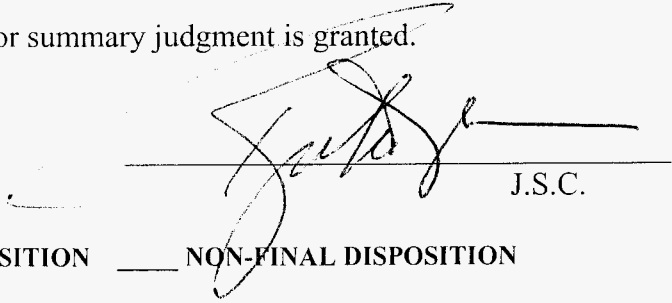
Michael O'Neill testified on behalf of CVS at its examination before trial. Mr. O'Neill stated that he has been employed by CVS for approximately eight years and has been the manager of the West Main Street store for about four years. He stated his duties include running the daily operations of the store, including the payroll, human resources and complaints. He also stated that he was absent on the day of the accident and the assistant manager was in charge. Mr. O'Neill testified that the assistant manager apprised him of the accident by leaving a note stating that "Dawn was bitten by a customer's dog." Mr. O'Neill testified that he discarded the note after he was assured that the incident had been

reported to risk management. Mr. O'Neill testified that the subject store has two sliding glass doors and on the front of those doors a sign is posted stating "no soliciting, no pets, shirts and shoes must be worn." He also testified that there is a sign that says "No Pets Allowed By Order of The Department of Health." He stated that the sign has been posted on the front door since he started working there in September of 2002 and was still in existence on August 9, 2004. Mr. O'Neill testified that only employees are allowed to post signs on the doors and the signs are only replaced when they become worn. He stated that management determines when it is time to order new signs and the only new signs that have been ordered and posted are the "WE ID" signs for cigarette purchases, merchandise signs and banners. Mr. O'Neill further testified that the "no pets" rule is strictly enforced by the store's employees and when an employee sees a pet in the store, they are required to notify management, who would then ask the customer to remove the animal from the store.

Under the instant circumstances, defendant has sustained her burden establishing her entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr., supra*; *Zuckerman v City of New York, supra*). Defendant has submitted evidence demonstrating that she was unaware of her animal having any proclivity to act in a vicious manner and therefore lacked notice of her animal's vicious propensities (*Bard v Jahnke, supra*; *Collier v Zambito, supra*; *Bernstein v Penny Whistle Toys, Inc., \_\_ AD3d \_\_, \_\_ NYS2d \_\_, 2007 NY Slip Op 3768, 2007 NY App. Div. LEXIS 5391 [1st Dept, May 1, 2007]*; *Rose v Heaton, \_\_ AD3d \_\_, 833 NYS2d 291, 2007 NY Slip Op 2850, 2007 NY App. Div. LEXIS 4165 [3rd Dept, Apr. 5]*). The plaintiff, in opposition, has failed to submit any evidence establishing that it was known to the defendant that Socrates exhibited a vicious propensity prior to the subject incident (*Bard v Jahnke, supra*; *Claps v Animal Haven, Inc., 34 AD3d 715, 825 NYS2d 125 [2006]*; *Aponte v Mott Haven Furniture Co., Inc., 33 AD3d 540, 823 NYS2d 70 [2006]*).

Accordingly, defendant's motion for summary judgment is granted.

Dated:           MAY 31 2007          

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

  X   FINAL DISPOSITION             NON-FINAL DISPOSITION