

Mercier v Alborelli

2007 NY Slip Op 32944(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0003564/2004

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-20-07
ADJ. DATE 6-28-07
Mot. Seq. # 001 - MD

-----X		
TREVOR A. MERCIER, an infant under the age	:	G. RONALD HOFFMAN, ESQ.
of fourteen years by his mother and natural	:	Attorneys for Plaintiffs
guardian, WENDY MERCIER and WENDY	:	25 West Main Street
MERCIER, individually,	:	Bay Shore, New York 11706
	:	
Plaintiffs,	:	
- against -	:	RICHARD T. LAU & ASSOCIATES
	:	Attorneys for Defendants
JODI ALBORELLI and JOHN WELCH, JR.,	:	P.O. Box 9040
	:	Jericho, New York 11753-9040
	:	
Defendants.	:	
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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 - 10 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 11 - 18 ; Replying Affidavits and supporting papers 19 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for summary judgment dismissing the complaint against them is denied.

This is an action to recover damages for personal injuries allegedly sustained by the infant plaintiff Trevor A. Mercier (hereinafter Trevor), as a result of a dog bite incident which occurred on April 5, 2001 at the defendants' residence in Rocky Point, New York. Plaintiff Wendy Mercier, Trevor's mother, sues derivatively. The plaintiffs were visiting defendants at their home when defendants' black Labrador Retriever named Sammy, bit Trevor, who was five years old at the time, in the face. The complaint alleges that Sammy was vicious with a ferocious nature and disposition and that the defendants knew of the dog's vicious character and disposition.

Defendants now move for summary judgment dismissing the complaint on the grounds that there is no evidence showing that their dog possessed vicious propensities or that they had knowledge of any such propensities prior to the incident. In support of their motion, the defendants submit, *inter alia*, the pleadings, the deposition transcripts of both plaintiffs and defendants, and Sammy's veterinary records.

Trevor testified that he was over the defendants' house at the time of the incident. He stated that he met Sammy approximately ten times before that day and that Sammy was a friendly dog. Trevor testified that it was dinnertime and he had finished eating and that Sammy was around the table. He further stated that he had gotten up from his chair, and that Sammy was right next to him and that he was petting Sammy. Trevor explained that he was petting Sammy on his back near his neck. In addition, he testified that Sammy growled a little bit, turned towards him, and then bit him in his nose and lip.

Wendy Mercier (hereinafter Mrs. Mercier) testified in pertinent part that she had known Sammy since the defendants had gotten him, and that her family had been very good friends of the defendants and would visit the defendants approximately twice a week. She described Sammy as a barker, who would occasionally jump up when you came in the front door and that Sammy was "hyper." She further testified concerning a prior incident between Trevor and Sammy, to the effect that Trevor had been playing outside with the defendant's son in a large box and had been playing with Sammy; that Trevor had gotten his mouth banged against the dog's head; and that consequently Trevor's two front baby teeth turned brown. Mrs. Mercier also stated on the day of the incident, she and her family arrived around dinnertime, and that they had been at the defendants' house for approximately an hour, and during that time Sammy barked a lot. She testified that she had been seated across the table from Trevor, and that Trevor had been excused from the table. She also stated that right before the incident occurred she saw Trevor walk over to Sammy, who was sitting, and pet him on the back of his neck. She explained that Trevor had about two seconds of contact with Sammy, when Sammy turned and bit Trevor on the face. She testified that after the bite, Trevor was bleeding from his nose and mouth, and that at the hospital, they had to sew Trevor's upper lip back on to the inside of his mouth and they had to give Trevor about twelve stitches in his nose.

Defendant Jodi Alborelli-Welch, s/h/a Jodi Alborelli (hereinafter Mrs. Welch), testified in pertinent part that they bought Sammy as a puppy and that Sammy was two years old at the time of this incident. She stated that although they have a dog crate in their kitchen, Sammy is permitted to wander within their residence. She alleged that they would crate Sammy when they had guests to keep him out of the way, but that they did not find it necessary to crate Sammy with the plaintiffs because the plaintiffs were around Sammy at least four times a week. Mrs. Welch explained that Sammy is a family dog and that was not trained as a guard dog. She also testified that Sammy wore an electronic barking collar for a week a couple of years ago. She stated that new neighbors had moved in behind them and the house had been vacant for a long time, so that when the new neighbors moved in, Sammy was barking a lot. Mrs. Welch further stated that she did not think that the electronic collar emitted an electrical shock and that she was not sure, but she thought that it would just vibrate. She also stated that Sammy would jump up in a friendly way and she agreed that Sammy was "hyper." As far as the prior incident between Trevor and Sammy, Mrs. Welch maintained that Trevor got hit in the teeth with her son's head, not with Sammy. She testified that Sammy was "a love" and would never snarl or snap, never show his teeth; and that they never had any prior incidents with Sammy as far as service people coming to the house, nor with Sammy's groomer or with other dogs. She testified however, that Sammy barks every day at the mailman, and that Sammy would growl when he wanted attention with his ball in his mouth. Finally, Mrs. Welch testified that she did see Sammy running along the fence barking at people, but only when the neighbors moved in behind them.

Defendant John Welch testified similarly to his wife. He also testified in pertinent part that he never saw Sammy nip at anyone or scratch anyone, and other than a tennis ball, he never saw Sammy bite anything. He stated that Sammy never killed another animal and he never muzzled Sammy. Additionally, he testified that Sammy had the electric barking collar on for about a week because the new neighbors had a lot of parties and Sammy would bark a lot with all the people in the yard. Mr. Welch further stated that the collar did not work and he did not think that it stopped Sammy from barking.

Defendants argue that the evidentiary facts demonstrate their entitlement to summary judgment. They assert that their sworn deposition testimony establishes that their dog never exhibited vicious propensities prior to the incident, and that they had no reason to know of such propensities as they never received any complaints about the dog's behavior, or had any problems with the dog prior to the incident. Indeed, contend the defendants, the plaintiffs' deposition testimony does not show that Sammy exhibited vicious propensities at any time prior to the incident.

The plaintiffs oppose this motion and argue that the defendants had notice of their dog's menacing propensities prior to the attack as they restrained Sammy in a crate to keep visitors away from him. They point out that Sammy ran up and down the fence of the defendants' property barking at neighbors, and that Sammy was hyperactive and jumped. The plaintiffs also assert that the defendants knew, despite attempting to down play and divert, that Sammy had injured Trevor prior to the subject attack. They also contend that the defendants put an electronic barking collar on their dog because they were having disciplinary problems with him and that the defendants made a positive determination that their dog had to be disciplined. The plaintiffs claim that an electronic collar, commonly known as a shock collar, is a punitive device which is condemned by experts in the field of animal behavior. They submit an affidavit of an animal behaviorist, Barbara M. Pezzanite, Ph.D., who states in pertinent part that remote-activated electronic dog collars should feature a variable shock intensity and are used to control intractable barking, dangerous habits, and certain forms of aggression. Ms. Pezzanite states that in her opinion the use of shock collars is not an ideal method of training in light of the availability of more humane methods and, if used, should only be used by skilled and experienced trainers. The plaintiffs claim that the evidence corroborates that the defendant's dog exhibited hostile and aggressive behavior, and conclude that the defendants had prior notice of Sammy's menacing and vicious propensities.

It is well settled that an owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm such animal causes as a result those propensities (*Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205 [2004]). "Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice" (*Collier v Zambito*, *supra* at 1 NY3d 446). Similarly, an attack which is severe and unprovoked may be an indication of vicious propensities (*Sherman v Torres*, 35 AD3d 436, 825 NYS2d 253 [2006]). "In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities—albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier v Zambito*, *supra* at 447).

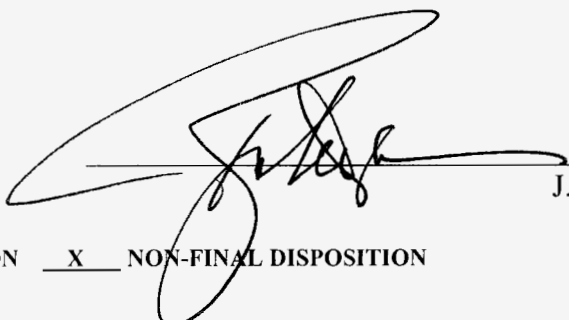
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In this case, the defendants have failed to make a prima facie showing of their entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any triable issues of fact (*Marek v Burmester*, 37 AD3d 668, 830 NYS2d 340 [2007]). Mrs. Mercier's deposition testimony to the effect that Sammy was "hyper," had previously injured Trevor, and that the attack at issue was unprovoked and fairly severe, as well as defendant Mrs. Welch's deposition testimony concerning Sammy's growling, jumping, territorial barking, and their use of an electronic collar on Sammy, raise triable issues of fact as to whether Sammy had vicious propensities and whether the defendants knew or should have known of such propensities. Accordingly, the defendants' motion for summary judgment is denied.

Dated: SEP 19 2007



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION