

Ferry v Ettinger

2008 NY Slip Op 30065(U)

January 3, 2008

Supreme Court, Suffolk County

Docket Number: 0017214/2006

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 7-23-07 (001)
MOTION DATE 10-1-07 (002)
ADJ. DATE 10-1-07
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MD

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GWEN N. FERRY,	:		:	DONIGER & ENGSTRAND, LLP
	:	Plaintiff,	:	Attorneys for Plaintiff
	:		:	12 Bayview Avenue
	:	- against -	:	Northport, New York 11768
	:		:	
JOAN ETTINGER, MELVIN ETTINGER and	:		:	CULLEN AND DYKMAN, LLP
NEW YORK CENTRAL MUTUAL FIRE	:		:	Attorneys for Defendants
INSURANCE COMPANY,	:		:	177 Montague Street
	:	Defendants.	:	Brooklyn, New York 11201-3602
-----X	:		:	

Upon the following papers numbered 1 to 34 read on this motion for partial summary judgment and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 24 - 30; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 20 - 23; Replying Affidavits and supporting papers 31 - 32; Other 33 - 34; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motion by plaintiff for partial summary judgment and the motion by defendants Ettinger for summary judgment are consolidated and decided together; and it is further

ORDERED that plaintiff's motion for summary judgment in her favor on the issue of liability is denied; and it is further

ORDERED that the motion by defendants Ettinger for summary judgment dismissing the complaint is denied.

This action was commenced to recover damages for personal injuries sustained by plaintiff Gwen Ferry, who was injured on May 29, 2006 by a dog owned by defendants Joan Ettinger and Melvin Ettinger. Plaintiff alleges that she was injured by defendants' dog, a Labrador Retriever named Lightning, when he was off his leash on a public road in the Town of Huntington.

Plaintiff now moves for partial summary judgment in her favor, arguing that defendants are strictly liable for her injuries, because they knew their dog possessed vicious propensities. In support of their motion, plaintiff submits copies of the pleadings, the parties' deposition testimony, the deposition testimony of two non-party witnesses, and a copy of Article I of the Code of the Town of Huntington pertaining to the regulation of dogs.

Defendants Ettinger oppose plaintiff's motion and cross-move for summary judgment dismissing the complaint, asserting that their dog does not possess vicious propensities. Defendants further allege that plaintiff was not the victim of a dog attack, and that she assumed the risk of injury when she pulled their dog by the collar. In support of their position, defendants submit copies of the pleadings, the transcripts of the parties' deposition testimony, and the testimony of a non-party witness, Gloria Smith.

Plaintiff testified at her deposition that on the date of the incident she and a friend, Gloria Smith, were walking their dogs in the Village of Asharoken, and that her niece was accompanying them as they walked. She testified that as they were walking she saw defendant Joan Ettinger walking her two Labrador Retriever dogs in the opposite direction. Plaintiff testified that when she first saw defendants' dogs, one of them appeared to be dragging its leash on the ground behind it. She testified that Mrs. Smith shouted to Mrs. Ettinger to leash both of her dogs, and that defendant complied. She testified that shortly thereafter, Mrs. Ettinger let go of the leashes and the two dogs, named Lightning and Shadow, came running toward them. Plaintiff testified that when defendants' dogs started running she did not know whether they were coming towards them or Mrs. Smith's dogs, and that she feared for her niece's safety. She testified that defendants' dogs then attacked one of Mrs. Smith's dogs, named Cody, by biting and pinning it to the ground. Plaintiff testified that when defendants' dogs attacked Cody, she grabbed Shadow's collar and Shadow released his hold on Cody. She testified that she next grabbed Lightning's collar, but the dog would not stop biting Cody. Plaintiff further testified that, because Lightning had previously bit her friend, she pulled Lightning by the collar in the direction opposite her face. She testified that as she pulled on his collar, Lightning spun around and lunged at her. Plaintiff testified that as the dog turned its body towards her, she suddenly felt pain in her thumb, which was wrapped around Lightning's collar. She testified that as a result of the incident, she required surgery to repair torn ligaments in her thumb.

In addition, plaintiff testified that she had pet Lightning and observed his behavior prior to the incident, as Mrs. Ettinger previously had brought the dog to Mrs. Smith's barn. Plaintiff testified that she stopped interacting with the subject dog after it bit her friend's face, and that there were times before the incident date when Lightning had growled at plaintiff. Plaintiff also testified that on one occasion she witnessed Lightning lunge at Mrs. Smith's face.

Gloria Smith's deposition testimony, in pertinent part, revealed that she is a neighbor of both plaintiff and defendants. Mrs. Smith testified that prior to the incident, Mrs. Ettinger would come with her dogs to visit the horses in Mrs. Smith's barn. Mrs. Smith testified that the first day she met defendants' dog Lightning, the dog lunged at her face with its mouth open. She testified that Mrs. Ettinger was surprised by Lightning's behavior and was apologetic. Mrs. Smith testified that on the incident date, she was walking her dogs next to plaintiff and plaintiff's niece. She testified that while they were walking, she saw Mrs. Ettinger with her two dogs approaching them from the opposite direction. Mrs. Smith testified that Mrs. Ettinger did not have her dogs' leashes in her hands, so she

asked her to pick up the leashes. She further testified that Mrs. Ettinger picked up the leashes, but then dropped them again. She testified that after Mrs. Ettinger released the leashes, the dogs ran towards them. She testified that defendants' dogs attacked her dog, Cody, and that plaintiff grabbed Lightning's collar. She testified that plaintiff was injured when Lightning jerked his body towards plaintiff as she held his collar.

Janet Adair testified that one day in April 2004, she and plaintiff were out walking their dogs when they met with Joan Ettinger, who was walking Lightning. She testified that Lightning bit her on the cheek when she bent down to pet him. Ms. Adair testified that the bite did not break her skin, but did cause a bruise about the size of a quarter on her cheek. Ms. Adair further testified that on the day she was bit, she may have put her face too close to Lightning's face, thereby invading the dog's "space."

At her deposition, Joan Ettinger testified that on the incident date both dogs were on their leashes, but that they started pulling on their leashes once they saw the other dogs. She testified that when her dogs started pulling she lost her balance and fell to the ground, causing her to release her grip on the leashes. Mrs. Ettinger testified that her two dogs then ran to Mrs. Smith's dogs, and that all of the dogs were barking. She testified that by the time she came over to her dogs, plaintiff already had separated the dogs. Mrs. Ettinger testified that Lightning had not lunged at Mrs. Smith or at a bicycle rider prior to this incident. She also testified that Lightning is not vicious or mean tempered.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). Once such a showing has been made, the burden shifts to the party opposing summary judgment to present evidence establishing the existence of a material question of fact requiring a trial (*Alvarez v Prospect Hosp.*, *supra*, at 324, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The opposing party must meet this burden by producing evidentiary proof in admissible form or by demonstrating a reasonable excuse for failing to meet the requirement of tender in admissible form (*see, Zuckerman v City of New York, supra*).

It is well settled that the owner of a domestic animal will be held liable for harm caused by the animal if the plaintiff establishes that the animal had vicious propensities and that the owner of the animal knew or should have known of such propensities (*see, 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]). Vicious propensities include the propensity to do any act that might endanger another (*see, 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 of an animal's vicious propensities may be demonstrated by presenting proof of prior acts of a similar nature of which the owner had notice (*see, Collier v Zambito, supra*). However, evidence of "normal canine behavior" is insufficient *see, Campo v Holland*, 32 AD3d 630, 820 NYS2d 352 [2006].

Here, both plaintiff and defendants have failed to make a prima facie showing of entitlement to

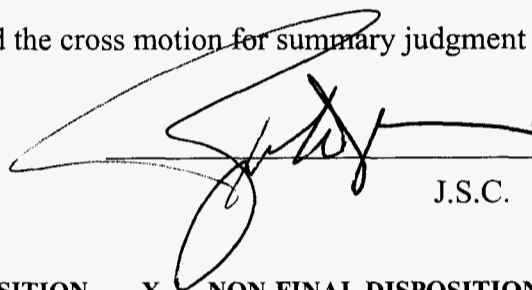
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summary judgment. Plaintiff seeks partial summary judgment on the issue of liability, yet failed to present prima facie evidence that defendants' dog exhibited vicious propensities. The deposition testimony presented raises issues of fact whether the dog's prior conduct towards Ms. Adair may be considered vicious behavior, when Ms. Adair herself testified that she may have been partially to blame, and that she suffered only a small bruise on her cheek as a result of the incident (*see, Rogers v Travis*, 229 AD2d 879, 646 NYS2d 206 [1996]; *Tessiero v Conrad*, 186 AD2d 330, 588 NYS2d 200 [1992]).

The conflicting deposition testimony further gives rise to issues of fact relating to defendants' cross motion for summary judgment dismissing the complaint. Here, defendants failed to meet their burden in establishing that the dog did not possess vicious propensities, nor have they met their burden in establishing the affirmative defense of assumption of risk by plaintiff (*see, Coole-Mayhew v Timm*, 18 AD3d 948, 794 NYS2d 486 [2005]). The Court notes that the word attack as it relates to a dog's actions "was intended to mean such overt actions by a dog as might cause a reasonable apprehension of harm or injury to a person, together with apparent ability in the dog to inflict such harm. Actual biting is unnecessary to an 'attack'" (*Matter of LaBorie v Habes*, 52 Misc2d 768, 769, 277 NYS2d 70 [1967]). Moreover, "a known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant liable for damages resulting from such an act" (*Anderson v Carduner*, 279 AD2d 369, 369-370, 720 NYS2d 18 [2001]; *see, Pollard v United Parcel Serv.*, 302 AD2d 884, 754 NYS2d 473 [2003]).

Accordingly, both the motion and the cross motion for summary judgment are denied.

Dated: JAN 03 2008



 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION