

McCarthy v Sotomayor

2008 NY Slip Op 30218(U)

January 16, 2008

Supreme Court, Nassau County

Docket Number: 7867-05/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

DENISE A. MCCARTHY,

Plaintiff(s),

MOTION DATE: 11/8/07

INDEX No.: 7867/05

-against-

MOTION SEQUENCE NO: 2

CAL. NO.:

GUIDO SOTOMAYOR, ROSA SOTOMAYOR
and SUJEY SOTOMAYOR,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Answering Affidavits.....	4-6
Replying Affidavits.....	7-9
Briefs:	10a, 10b

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint is denied.

This is an action to recover money damages for personal injuries which arise out of a dog bite sustained by plaintiff on June 26, 2004 at the home of defendants Guido and Rose Sotomayor at 61 Winter Lane, Hicksville, New York. It is undisputed that defendants' family dog, Spartacus, bit plaintiff on the hand and wrist while she was attempting to deliver mail to that address. According to defendant Sujey Sotomayor, she and her two children lived together with her parents Guido and Rosa at the Winter Lane address.

The defendants seek summary judgment dismissing the complaint contending that the bite sustained by plaintiff was a "first bite" and they had no knowledge or reason to be aware of the dog's vicious propensities and they were not on notice that the dog had vicious propensities or had acted aggressively at any time prior to the incident herein.

Dog owners are strictly liable for personal injuries resulting from a dog bite if the owner knew or should have known that the

animal has vicious propensities. The vicious propensities which go to establish liability include a propensity to do any act which might endanger another (*Bard v Jahnke*, 6 NY3d 592, 597; *Collier v Zambito*, 1 NY3d 444, 446). Proof of a vicious propensity may be demonstrated by showing defendant's awareness of a prior vicious act or that the animal had a proclivity to act in such a vicious manner (*Sherman v Torres*, 35 AD3d 436, 437). An attack that is severe and unprovoked is an indicia of vicious propensities (*Moriano v Schmidt*, 133 AD2d 72).

Even in the absence of a prior bite, a triable issue of fact regarding knowledge of vicious propensities may be raised by other evidence of the dog's aggressive behavior (*Calabro v Bennett*, 291 AD2d 616). The fact that a dog has been known to growl, snap or bear 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 owner's knowledge of the animal's vicious propensities (*Collier v Zambito*, *supra* at 447; *Morse v Colombo*, 8 AD3d 808, 809). Moreover, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but 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 (*Marek v Burmester*, 37 AD3d 668, 669).

Defendants contend, in support of the motion, that the incident involving plaintiff was the first occasion on which the dog acted in an aggressive manner toward an individual coming onto their property. In deposition testimony they stated that the only prior complaints they received about the dog related to barking. Rosa Sotomayor testified, *inter alia*, that she never observed the dog bare its teeth or growl at visitors. Nevertheless, defendants decided to put the dog down after it had bitten plaintiff rather than expose Suje's children, who were six and three years of age at the time, to the risk of being around an animal who had bitten someone. The Sotomayors deny receipt of letters from their neighbor at 57 Winter Lane complaining about the dog's aggressive behavior and his being allowed to run unleashed. Assuming that defendants met their burden with proof that they had no knowledge of any vicious propensities or prior biting incidents, plaintiff's response, in this court's view, sufficiently raises questions of fact regarding defendants' knowledge of such propensities.

In opposition to defendants' motion, plaintiff has submitted the affidavit of Norman Citron, the Sotomayors' neighbor at 57 Winter Lane, alleging, *inter alia*, that he personally observed Spartacus running freely and unsupervised, without a leash, in the

