

Callahan v Happy Tails
2008 NY Slip Op 33493(U)
December 23, 2008
Supreme Court, New York County
Docket Number: 113352/2004
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Justice

WILLIAM CALLAHAN AN INFANT BY HIS FATHER AND NATURAL GUARDIAN SEAN CALLAHAN AND SEAN CALLAHAN INDIVIDUALLY,

Plaintiffs,

- v -

HAPPY TAILS, DAVID McCOMB, 150 WEST 87TH STREET OWNERS CORP. AND ZUCKERMEN & WALDORF, INC.,

Defendants.

INDEX NO. 113352/2004

MOTION DATE 8/7/08

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion for summary judgment

	<u>PAPERS NUMBERED</u>
Notice of Motion— Affirmation — Exhibits A-I	<u>1-2</u>
Opp. Affirmation — Affidavits— Exhibits A, B	<u>3-5</u>
Reply Affirmation	<u>6</u>
Supplemental Opp. Affirmation— Exhibit A	<u>7</u>
Reply Affirmation to Suppl Affirmation	<u>8</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED: _____ J.S.C.

FILED
JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 12/23/08
New York, New York

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
WILLIAM CALLAHAN, an infant by his father and natural guardian, SEAN CALLAHAN, and SEAN CALLAHAN, individually,

Index No. 113352/2004

Plaintiffs,

- against -

Decision and Order

HAPPY TAILS, DAVID MCCOMB, 150 WEST 87TH OWNERS CORP., and ZUCKERMEN & WALDORF, INC.,

Defendants.

FILED
JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN, J.:

Defendant David McComb was the owner of a male pit bull terrier named Oxford, and McComb hired defendant Happy Tails to walk the dog. On February 2, 2004, while in the custody of Happy Tails, the dog allegedly bit plaintiff William Callahan, a child about two and a half years old, on the face, when they were in an elevator of the building where Callahan and McComb resided. On September 20, 2004, William Callahan and his father commenced this action against defendants, alleging negligence and a derivative cause of action.

McComb and Happy Tails each move for summary judgment dismissing the complaint as against them (Motion Seq. Nos. 003 & 007). Plaintiffs cross-moved for additional discovery. This decision addresses both motions. Plaintiffs' cross motion was granted by interim decision and order dated July 24, 2007.

DISCUSSION

The standards for summary judgment are well settled.

“[T]he 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.”

Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986)(internal citations omitted).

“[W]hen harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in Collier [v Zambito], 1 NY3d 444.” Bard v Jahnke, 6 NY3d 592, 599 (2006). Collier states, in pertinent part:

“For at least 188 years, the law of this state has been that the 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 the animal causes as a result of those propensities. . .

Knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice. In addition, a triable issue of fact as to knowledge of a dog's vicious propensities might be raised-- even in the absence of proof that the dog had actually bitten someone--by evidence that it had been known to growl, snap or bare its teeth. Also potentially relevant is whether the owner chose to restrain the dog, and the manner in which the dog was restrained.

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, 1 NY3d 444, 446-447 (2004)(internal citations omitted).

In support of summary judgment, McComb submits excerpts of the testimony of Joan Van Fleet, the owner of Happy Tails. According to Van Fleet, Oxford was a very loving dog, who used to walk in a pack or a group of dogs, and there was never an incident involving Oxford with the other dogs. Mitkoff Affirm., Ex F [Van Fleet EBT], at 21; Van Fleet avers that, when she walked Oxford,

he did not pull her, never reacted when he was around children, and was a well-trained dog. Van Fleet Aff. ¶ 9. McComb stated at his deposition that he had owned the dog for approximately eight years at the time of his deposition. Mitkoff Affirm., Ex G [McComb EBT], at 28. McComb never saw the dog approach a child on his own, and the dog had never bitten anyone prior to the incident in question, even in play. *Id.* at 28, 51. McComb stated that no one had made any complaints regarding the dog's behavior. *Id.* at 75. Van Fleet states that, over the five year period of Happy Tails walking the dog, she never received any complaints from any of the other dog owners when the dog was walked in a group. Van Fleet Aff. ¶ 10. The building's superintendent testified at his deposition that he never saw Oxford bare his teeth, and he never barked or growled at him when they were in the elevator. Mitkoff Affirm., Ex I, at 9-10, 16. Given all the above, defendants have demonstrated prima facie entitlement to summary judgment as a matter of law, by presenting evidence that they did not have notice of any vicious propensities of the dog. *See e.g. Bernstein v Penny Whistle Toys, Inc.*, 40 AD3d 224 (1st Dept 2007), *affd* NY3d 787 (2008); *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 (2d Dept 2008); *Claps v Animal Haven, Inc.*, 34 AD3d 715 (2d Dept 2006).

In opposition, plaintiffs submit an affidavit from a veterinarian who states that a choke collar used on the dog (which is undisputed), caused additional stress on the dog's painful neck and made him act aggressively, thereby causing the incident. Kroll Aff. ¶ 10. The veterinarian also states that, notes from the dog's treating veterinarian indicate possible hypothyroidism, which plaintiffs' veterinarian states can cause aggressive behavior. *Id.* ¶ 8. William Callahan's nanny states that, several months prior to the incident, the dog entered the elevator with the children and let out a growling noise, which she describes as a "vicious growl." Roopchand Aff. ¶ 8. Because of this

incident, Roopchand stated that she could never bring the children anywhere near the dog again.

Ibid. Plaintiffs also contend that questions of fact arise because McComb testified at a further EBT that, prior to Callahan's bite, his dog was bitten by another dog while being walked. Gennarelli Suppl. Opp. Affirm., Ex A at 10. The dog walker told McComb that he had to pull the dogs apart. Ibid.

Van Fleet states that it was Happy Tails' policy to ask for permission to enter with a dog into an elevator, and that if permission is not granted, they will wait for the next elevator. Van Fleet Aff. ¶ 12.

The incident with another dog is not sufficient to raise a triable issue of fact, because the only evidence as to that incident shows that it was unprovoked. According to McComb, the dog walker stated that "the other dog came out of no where and grabbed onto him." Gennarelli Suppl. Opp. Affirm., Ex A at 10. However, McComb's and Happy Tails' use of the choke collar, which plaintiffs' veterinarian states is used to control a dog that is not easily controlled (Kroll Aff. ¶ 10), raises issues of fact as to what McComb and/or Happy Tails knew about the dog to cause them to use a choke collar and thus as to McComb's and Happy Tails' knowledge, if any, about the dog's vicious propensities, if any. As plaintiffs' veterinarian indicates, the dog's treating veterinarian recommended that McComb discontinue the use of the choke collar and use a body harness. Kroll Aff. ¶ 11; Gennarelli Opp. Affirm., Ex B [veterinarian's notes of 1/19/04]. It can be reasonably inferred from any contraindicated use of the choke collar that McComb or Happy Tails may have had countervailing reasons for a need to control the dog which overrode the advice of the dog's veterinarian.

Therefore, McComb's and Happy Tails' motions for summary judgment are denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motions for summary judgment by defendants David McComb and Happy Tails are denied.

Dated: *December 23, 2008*
New York, New York

ENTER: 

J.S.C.

FILED
JAN 05 2009
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