

Lodico v Ingrassia

2010 NY Slip Op 33634(U)

December 27, 2010

Sup Ct, Suffolk County

Docket Number: 09-10360

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-14-10
Mot. Seq. # 003 - MG; CASEDISP

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GABRIELLA LODICO, an infant under the age of	:	THOMAS J. STOCK & ASSOCIATES
14 years, by her mother and natural guardian,	:	Attorney for Plaintiff
PATRICIA LODICO, and PATRICIA LODICO,	:	88 Second Street
individually,	:	Mineola, New York 11501
	:	Plaintiff,
- against -	:	McCABE, COLLINS, McGEOUGH & FOWLER
	:	Attorney for Defendants
CHARLES INGRASSIA and SUSAN	:	346 Westbury Avenue, P.O. Box 9000
INGRASSIA,	:	Carle Place, New York 11514
	:	Defendants.
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated July 26, 2010, and supporting papers (including Memorandum of Law dated ___); (2) Affirmation in Opposition by the plaintiff, dated August 6, 2010, and supporting papers; (3) Reply Affirmation by the defendant, dated September 2, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendants Charles Ingrassia and Susan Ingrassia seeking summary judgment dismissing plaintiffs' complaint is granted.

Plaintiff Patricia Lodico commenced this action on behalf of herself and her infant daughter, Gabriella Lodico, to recover damages for injuries allegedly sustained by Gabriella Lodico as a result of an attack by a dog that occurred on February 9, 2008. Plaintiffs, by their bill of particulars, allege that while Gabriella Lodico was kissing defendants Charles Ingrassia's and Susan Ingrassia's dog, Zena, a four year old Neapolitan Mastiff, goodbye, the dog "swiped" her paw across Miss Lodico's face, causing her to fall backwards, hit her face, and break her nose on an ottoman in the den. The subject incident took place at defendants' premises, located at 3 Torrington Lane, Shoreham, New York.

Defendants now move for summary judgment on the basis that plaintiffs are unable to establish that their dog displayed any vicious tendencies or propensities, or that they had knowledge or should have had knowledge of such propensity on behalf of their dog prior to the incident. In support of the

motion, defendants submit a copy of the pleadings and copies of the parties' deposition transcripts. Plaintiffs oppose the instant motion on the grounds that material questions of fact exist as to whether defendants should have known of Zena's vicious propensities, since the dog's breed is recognized as a "guard dog," is extremely large, and defendants had the dog euthanized after the incident. Plaintiff concedes that there is no proof that Zena had ever bitten anyone prior to the incident with Miss Lodico.

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; but merely to determine the existence of such issues (*see Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910, 841 NYS2d 615 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2005]; *Scott v Long Is. Power Auth.*, 294 AD2d 348, 741 NYS2d 708 [2002]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2004]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2001]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767, 861 NYS2d 732 [2008]; *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 [2004]; *Celardo v Bell*, 222 AD2d 547, 635 NYS2d 85 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v New York*, 49 NYS2d 557, 427 NYS2d 595 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022, 315 NYS2d 973 [1970]).

Where a pet owner knows or should have known of his or her pet's vicious propensities, he or she is strictly liable "for the harm the animal causes as a result of those propensities" (*Collier v Zambito*, 1 NY3d 444, 448, 775 NYS2d 205 [2004]; *see Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532 [2008]; *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]; Restatement (Second) of Torts § 509 [1]). Vicious propensities include the "propensity to do any action that might endanger the safety of the persons or property of others in a giving situation" (*Collier v Zambito*, *supra* at 446, 770 NYS2d 205). Evidence tending to demonstrate a dog's vicious propensities includes a prior attack; the dog's tendency to growl, snap or bare its teeth; whether the owner chose to restrain the dog or the manner in which the dog was restrained (*see Bard v Jahnke*, *supra*; *Collier v Zambito*, *supra*; *Dykeman v Heht*, 52 AD3d 767, 861 NYS2d 731 [2008]). In the absence of a prior bite, a triable issue of fact regarding a defendant's knowledge of its animal's vicious propensity may be raised by other evidence of the animal's aggressive behavior (*see Grillo v Williams*, 71 AD3d 1480, 897 NYS2d 371 [2010]; *Sherman v Torres*, 35 AD3d 436, 825 NYS2d 253 [2006]; *Calabro v Bennett*, 291 AD2d 616, 737 NYS2d 406 [2002]). Also, the keeping of a dog as a guard dog may give rise to an inference that the owner had knowledge of the dog's vicious propensities (*see Parente v Chavez*, 17 AD3d 648, 793 NYS2d 517 [2005]). Moreover, when an animal reflects a proclivity to act in a way that puts others at risk of harm, that animal can be found to have vicious propensities, but only when such proclivity results in an injury (*see Collier v Zambito*, *supra*; *Dykeman v Heht*, *supra*; *Seybolt v Wheller*, 42 AD3d 643, 839 NYS2d 830 [2007]). In contrast, evidence of "normal canine behavior," such as barking and

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chasing small animals, is insufficient to demonstrate vicious propensities (*see Campo v Holland*, 32 AD3d 630, 820 NYS2d 352 [2006]; *Seybolt v Wheeler*, *supra*; *Fontanas v Wilson*, 300 AD2d 808, 751 NYS2d 656 [2002]).

Susan Ingrassia testified at an examination before trial that on the day of Miss Lodico's accident that she and her family owned three dogs, Zena, a Neapolitan Mastiff; Bella, a Golden Retriever; and Louie, a Maltese. She testified that Zena was the dog that was involved in the incident with Miss Lodico, and that at the time of the incident Zena was approximately four years old and weighed about 125 pounds. Mrs. Ingrassia testified that Zena was bought from a pet store, and that she and her family had owned Zena since she was a puppy. She testified that Zena had not received any formal dog training, was playful, loved people, and had never bitten, growled, or been aggressive towards anyone. Mrs. Ingrassia testified that all three of the dogs were allowed to run around the house freely, and neither Zena nor her other two dogs were restrained in the house, except when they were puppies. She testified that neither she nor anyone in her family had ever received any complaints about Zena, and that she was never warned or informed about the disposition of a Neapolitan Mastiff. She testified that Miss Lodico had spent the night at her home the previous evening, and that she believed Miss Lodico had played with the dogs, mostly Bella and Louie. She testified that prior to the incident, she was asleep on the couch in her den and that Zena was lying on the floor next to her. Mrs. Ingrassia testified that she was aroused from her sleep by Miss Lodico's and her brother Thomas's screams, and that she saw her daughter, Mary Ann, holding Miss Lodico, who was bleeding, in her arms. She testified that Miss Lodico informed her that "she had bent down to kiss [Zena], who was asleep, goodbye, and that the dog hit [Miss Lodico] with her paw in the face, and that she fell over the [ottoman]." She testified that Zena panicked and ran into the kitchen after the incident. Mrs. Ingrassia further testified that Zena was put to "sleep" after the incident, because she did not want the dog to hurt anyone else.

Gabriella Lodico testified at an examination before trial that prior to the incident, her brother, Thomas Lodico, had picked her up from a school dance, and that she spent the night at the defendants' home with her brother and his fiancée, defendants' daughter, Mary Ann. Miss Lodico testified that she arrived at defendants' home around 1:00 a.m. and that there were three dogs at the home. She testified that the dogs were excited to see her, that they barked playfully, but did not growl, and that she played with them for approximately 10 to 20 minutes before going to bed. She testified that the dogs were not allowed upstairs, and that Bella and Louie slept in cages downstairs, but that Zena did not sleep in a cage. She testified that after eating breakfast the next morning, she went outside with the dogs and played with them, before heading to the mall. Miss Lodico testified that after returning to defendants' home from the mall, and before her brother took her home, she went into the living room to say goodbye to everyone, including the dogs. She testified that she hugged and kissed each dog goodbye, and that Zena was the last one she addressed. She testified that while Zena was laying down she placed the dog's head in her hands and kissed her nose. However, when she went to kiss the dog's nose again, the dog rose, and swiped her face with its paw. She testified that this caused her to fall back, hit her face on the armchair, and break her nose. Miss Lodico testified that the dog did not growl, bark, or bite during the incident. She testified that her face was bleeding, everyone began screaming, and she was taken to the hospital, where her parents met her. Miss Lodico further testified that she was not given any instructions to stay away from Zena when she arrived at defendants' home the previous night, that there were no signs saying "beware of dog," and that she believes the accident occurred because she startled the dog.

Patricia Lodico testified at an examination before trial that she is the mother of Gabriella Lodico, and that her daughter was injured while spending the night with her son, Thomas Lodico, and his fiancée, at defendants' home. She testified that she was informed of her daughter's accident by her son, who told her that her daughter had a "minor accident and needed stitches." She testified that she had never been to defendants' home prior to the accident and that she had never met any of defendants' dogs. Mrs. Lodico further testified that now her daughter is very conscientious of people looking at her, she wears a lot of makeup whenever there is a special occasion, and her daughter is not as affectionate with their two English Springer Spaniels anymore. Instead she "braces" herself whenever the dogs jump.

Charles Ingrassia testified at an examination before trial that he was not present when the subject accident occurred, but was on his way home from refereeing a basketball game when his wife phoned him about the incident. He testified that his wife informed him that "Zena was asleep on the floor, Gabby went to kiss her goodbye, startled her, she jumped up, scratched Gabby's face, and knocked Gabby into a table or something." He testified that he met his wife at the hospital and that upon arrival he saw that Miss Lodico's face was cut. He testified that Zena was purchased by his older son, Charles, Jr., and his wife's brother, as a puppy from a pet store. He testified that when his son purchased the dog, the pet store did not provide him with any warnings about Zena's behavior or disposition. Mr. Ingrassia testified that the only information he had received regarding the disposition of a Neapolitan Mastiff was from his co-worker at the firehouse, who owns one, and he informed him that "they are very good with people." He testified that his co-worker actually brought his dog to the firehouse, and that he and the rest of the firemen played with the dog. Mr. Ingrassia testified that he is unaware of any incidents prior to the one with Miss Lodico where Zena growled or behaved aggressively, and that he witnessed Miss Lodico petting Zena the night before the incident. Mr. Ingrassia further testified that Zena was euthanized approximately one month after the incident with Miss Lodico, because she bit his brother while he was playing with her.

Here, defendants have established, *prima facie*, their entitlement to judgment as a matter of law with evidence showing that they neither knew nor should have known of their dog's vicious propensities or that their dog's behavior reflected a proclivity to act in a way that put others at risk of harm (*see Petrone v Fernandez*, 12 NY3d 546, 883 NYS2d 164 [2009]; *Bard v Jahnke*, *supra*; *Collier v Zambito*, *supra*; *Galagano v Town of N. Hempstead*, 41 AD3d 536, 840 NYS2d 794 [2007]; *Brooks v Parshall*, 25 AD3d 853, 806 NYS2d 796 [2006]; *Blackstone v Hayward*, 304 AD2d 941, 757 NYS2d 160 [2003], *lv denied* 100 NY2d 511, 766 NYS2d 164 [2003]). Defendants' evidence establishes that Zena did not show any acts of aggression prior to the incident with Miss Lodico (*see Malpezzi v Ryan*, 28 AD3d 1036, 815 NYS2d 295 [2006]). They have shown that the dog did not "snarl, bark, gnarl or bare" her teeth prior to the subject incident (*see Collier v Zambito*, *supra*), and that no one ever complained about Zena's behavior (*see Malpezzi v Ryan*, *supra*). In addition, the evidence demonstrates that Miss Lodico had been around Zena on two prior occasions without incident, and that the incident occurred as a result of Miss Lodico startling the sleeping dog.

In opposition, plaintiffs have failed to raise a triable issue of fact as to whether the defendants knew or should have known of their dog's vicious propensities prior to the subject incident (*see Scheidt v Oberg*, 65 AD3d 740, 883 NYS2d 661 [2009]; *Brooks v Parshall*, *supra*). Plaintiffs' evidence submitted in opposition to defendants' *prima facie* showing fails to establish that Zena's behavior ever

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exceeded that of a “normal canine” (*see Collier v Zambito, supra; Campo v Holland, supra*). Miss Lodico’s deposition testimony shows that Zena never attacked her or anyone else prior to the subject incident (*compare Hagadorn-Garmely v Jones*, 295 AD2d 801, 744 NYS2d 538 [2002]). Indeed Miss Lodico testified that she believes the incident occurred because she “startled” the dog. Moreover, plaintiffs have not submitted any evidence to demonstrate that there were warning signs posted on defendants’ property informing visitors or passersby to beware of the dog (*see Rose v Heaton*, 39 AD3d 937, 833 NYS2d 291 [2007]; *Miller v Isacoff*, 39 AD3d 718, 833 NYS2d 246 [2008]); that the dog was chained or confined in an attempt to keep the dog away from visitors (*see Sherman v Torres*, 35 AD3d 436, 825 NYS2d 253 [2006]; *Francis v Curley Family Partnership*, 33 AD3d 852, 823 NYS2d 475 [2006]); or that the dog was kept as a guard dog (*see Grubb v Healy*, 52 AD3d 472, 859 NYS2d 482 [2008]; *Francis v Becker*, 50 AD3d 1507, 857 NYS2d 824 [2008]; *Parente v Chavez, supra*). In fact, Miss Lodico testified that there were no “beware of dog” signs posted on defendants’ property, that the defendants’ dogs were excited to see her, and that she played with all three of defendants’ dogs, including Zena, the night before and the morning of the incident. In addition, the mere fact that the dog was of a large breed and it was recommended that the dog’s breed be supervised around children, does not raise a triable issue of fact (*see Malpezzi v Ryan, supra; Palleschi v Granger*, 13 AD3d 871, 786 NYS2d 627 [2004]; *Mulhern v Chai Mgt.*, 309 AD2d 995, 765 NYS2d 694 [2003], *lv denied* 1 NY3d 508, 777 NYS2d 17 [2004]). Nor does the fact that defendants had Zena euthanized raise a triable issue of fact, because subsequent remedial measures are inadmissible in negligence cases (*see Brown v Home Depot*, 304 AD2d 699, 758 NYS2d 378 [2003]; *Pisano v Door Control, Inc.*, 268 AD2d 416, 702 NYS2d 307 [2000]).

Finally, contrary to plaintiffs’ assertion that this is an ordinary negligence case, a plaintiff cannot recover in common-law negligence for harm caused by an animal, because negligence is no longer a basis for imposing liability upon an animal’s owner (*see Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 856 NYS2d 532 [2008]; *Wright v Fiore*, __ AD3d __, 2010 NY Slip Op 7531 [2nd Dept 2010]; *Egan v Hom*, 74 AD3d 1133, 905 NYS2d 624 [2010]; *Feit v Wehrli*, 67 AD3d 729, 888 NYS2d 214 [2009]; *Frank v Easton*, 54 AD3d 805, 864 NYS2d 97 [2008]). Therefore, plaintiffs remaining contentions are without merit. Accordingly, defendants’ motion for summary judgment is granted.

Dated: 12/27/10


 PETER H. MAYER, J.S.C.