Cooper v Meyer
2011 NY Slip Op 30703(U)
March 10, 2011
Sup Ct, Nassau County
Docket Number: 011837/08
Judge: Thomas P. Phelan
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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

KELSEY M. COOPER, an Infant, by her Mother and Natural Guardian, MICHELE COOPER, and MICHELE COOPER, Individually,

Plaintiffs,

-against-

JENNIFER MEYER and PETER MEYER, Individually and as parents of infant GRIFFIN MEYER, and GRIFFIN MEYER, Individually,

Defendants.

ORIGINAL RETURN DATE: 10/15/10
SUBMISSION DATE: 01/04/11
Index No. 011837/08

MOTION SEQUENCE #1

The following papers read on this motion:

Notice of Motion..	1
Answering Papers...	2
Amended Reply...	3

Motion by defendants for an order, pursuant to CPLR 3212, granting them summary judgment dismissing plaintiffs' complaint is granted for the reasons set forth herein.

Plaintiffs commenced this action for personal injuries allegedly sustained by the infant plaintiff, who was 15 years of age at the time of the incident when she was attacked and bitten by defendants' dog, an Airedale Terrier, named Jaspar. The incident occurred on May 11, 2007, in the backyard of premises 27 Arleigh Road, in the Village of Kensington, Town of Great Neck, County of Nassau and State of New York. The infant plaintiff testified at her deposition that she bent down to pet Jaspar; as she was squatting, she fell back and lost her balance (p. 20). She stated: "As I was falling I saw the dog jumping to like attack me so I put my hands above my face to protect my face" and "[h]e bit my ear" and "my finger" (p. 24). Infant plaintiff saw that part of her ear was missing (p. 25).

The law of this state has been that the owner of a domestic animal who either knows or should have known of their animal's vicious propensities will be held liable for the harm the animal caused as a result of those propensities (*Collier v Zambito,* 1 NY3d 444 [2004]). However, before the owners of a domestic animal can be held strictly liable for an injury inflicted by the animal, plaintiff must establish that the animal had vicious propensities and that the owner had or reasonably should have had knowledge thereof (*Arbegast v Board of Educ.,* 65 NY2d 161 [1985]; *Beljean v Maiuzzo*, 256 AD2d 533 [2d Dept. 1998]; *Velazquez v Carns,* 244 AD2d 620 [3d Dept. 1997]).

"Vicious propensities" are propensities on the part of a dog which are likely to cause injury under the circumstances in which the person controlling the dog places it; a vicious propensity does not mean only the type of violent behavior exhibited by a biting dog, that is a propensity to attack human beings; it includes the natural fierceness or disposition to mischief as might occasionally cause the dog to attack human beings without provocation (*Collier v Zambito, supra*). A dog's vicious propensities are not established by evidence of a dog's barking, running loose, jumping and lunging since these are activities that are common in dogs (*Brouk v Brueggeate*, 849 SW2d 699; see also *Collier v Zambito, supra*).

Clearly, to establish that the owner of a domestic animal should have known of the animal's vicious tendencies so that the owner may be held strictly liable for injuries caused by the animal, tendencies must have existed for a sufficient period of time to allow a reasonable person to discover them (*Wilson v Whiteman*, 237 AD2d 814 [3d Dept. 1997]). The fact that a dog barked and growled just prior to the incident did not give evidence of vicious tendencies (*Valazquez v Carns, supra*).

Evidence tending to demonstrate a dog's vicious propensities, for purposes of strict liability in a tort claim, includes a prior attack, the dog's tendency to growl, snap or bare its teeth (*Dykeman v Heht*, 52 AD3d 767 [2d Dept. 2008]); the manner in which the dog was restrained, the fact that the dog was kept as a guard dog and a proclivity to act in a way that puts others at risk of harm (*Feit v Wehrli*, 67 AD3d 729 [2d Dept. 2009]). Vicious propensities include the propensity to do any act that might endanger the safety of persons and property of others in a given situation (*Rose v Heaton,* 39AD3d 937 [3d Dept. 2007]). Injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common law negligence (see *Bard v Jahnke*, 6 NY3d 592 [2006]; *Morse v Colombo,* 31 AD3d 916 [3d Dept. 2006]).

Evidence of vicious propensities was not found where a dog was never known to exhibit aggressive behavior and no one ever complained about the dog's behavior to the dog owners, even though the dog usually barked at people who came onto the property (see *Scheidt v Oberg*, 65 AD3d 740 [3d Dept. 2009]).

Negligence is no longer a basis for imposing liability (*Petrone v Fernandez*, 12 NY3d 546 [2009]; *Alia v Fiorina*, 39 AD3d 1068 [3d Dept. 2007]). When harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities (*Petrone v Fernandez, supra*).

The deposition testimony of defendant Jennifer Meyer and the infant defendant reveals that Jaspar had never bitten anyone before the incident.

Non-party witness, Dr. Gary John Dattnar, Jaspar's veterinarian, testified based upon his notes of the dog's visits to his office, which indicate that the Meyer's owned the dog in 1999. Although Dr. Dattnar saw aggressive behavior* in the dog, he stated: "People and pets often behave very differently in the hospital than they do outside the hospital" (Movant's Ex. I, p. 40). Dr. Dattnar was not aware of any dog bites other than this incident (Id., p. 41).

Also submitted is the deposition testimony of non-party witnesses, James Garfinkel and Naomi Garfinkel, who operate Pet Sitters Club. According to the testimony, the Garfinkels noticed behavior changes in Jasper sometime around 2001 or 2002 and decided not to give Jaspar to any of their other employees (Movant's Ex. K, p.17). Mr. Garfinkel never heard of Jaspar biting anyone other than the infant plaintiff and would not categorize Jaspar as dangerous (Id., pp. 35, 37). Mrs. Garfinkel testified that she stopped walking Jaspar because she was afraid that "he might either growl or bite" (Movant's Ex. L, p. 7).

Mr. Garfinkel testified that from his experience "these kind of dogs . . . are capable of going to that next level which could be a growl and then to a bite because . . . they don't feel comfortable, somebody's coming onto their territory" (Ex. K, p. 36). Mr. Garfinkel testified, however, that in the more than 50 walks with Jaspar he never had an issue (Id., p. 26).

Plaintiff argues that Jaspar's aggressive behavior in the veterinarian's office required Jaspar to be muzzled and sedated. It is submitted that such behavior cannot be considered normal. Defendants counter that plaintiffs have not submitted any expert opinion that behavior in the office of a veterinarian is indicative of behavior at other times.

The record herein is insufficient to raise an issue of fact as to whether Jaspar had vicious propensities that were known or should have been known to defendants. Here, there is no evidence of a previous biting incident and no history to indicate an apparent vicious nature of the dog in his home.

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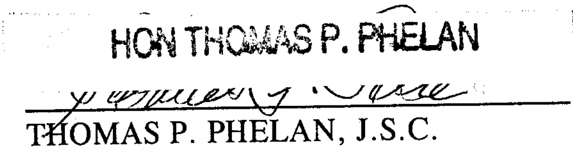
* Meaning that the pet will bite in those surroundings, e.g., a doctor's office (p. 24).

In conclusion, defendants have supported their motion for summary judgment with deposition testimony that, to the best of their knowledge, Jaspar had never previously bitten anyone or otherwise evidenced vicious propensities (see *Arcara v Whytas,* 219 AD2d 871 [4th Dept. 1995]). Proof of the animals' ferocious nature and defendants' knowledge thereof is essential to a cause of action for injuries sustained in an attack by a dog (*Fox v Martin,* 174 AD2d 875 [3d Dept. 1991]); defendants' showing established, *prima facie*, their entitlement to judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). The burden thereupon shifted to plaintiffs to demonstrate the existence of a triable issue of fact (*Plue v Lent*, 146 AD2d 968 [3d Dept. 1989]). On this record, that burden has not been met. Plaintiffs' contentions that triable issues of fact exist are "insufficient in the absence of any additional corroborative evidence that prior to this incident the dog demonstrated any fierce or hostile tendencies (citations omitted)" (*Lugo v. Angle of Green, Inc.*, 268 AD2d 567 [2d Dept. 2000]).

Defendants submit that plaintiffs do not contest the dismissal of the first (negligence), third (emotional harm), fourth (lack of parental supervision) and fifth (service of alcohol to minors) causes of action and that such failure is concession of lack of merit. Moreover, defendants assert that underage consumption of alcohol and lack of parental supervision are not proximate causes of the incident.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN



Dated: 3-10-11

THOMAS P. PHELAN, J.S.C.

ENTERED
MAR 15 2011
NASSAU COUNTY
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