

**Hurnyak v Mule**

2011 NY Slip Op 32561(U)

September 22, 2011

Supreme Court, Suffolk County

Docket Number: 10-8862

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 3-29-11 (#003)  
MOTION DATE 4-8-11 (#004)  
ADJ. DATE 8-25-11  
Mot. Seq. # 003 - MG  
# 004 - MG; CASEDISP

-----X  
CAROL HURNYAK and ERIC HURNYAK,  
  
Plaintiffs,  
  
- against -  
  
ANTHONY MULE, BARBARA MULE and  
PATRICIA MESSINA-PANZARELLA,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 32 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 24; Answering Affidavits and supporting papers 25 - 28; Replying Affidavits and supporting papers 29 - 30; Other 31 - 32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by defendants Anthony Mule and Barbara Mule for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against them is granted; and, it is further

**ORDERED** that the motion by defendant Patricia Messina-Panzarella for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint as asserted against her is granted.

*Handwritten signature*

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Carol Hurnyak (the plaintiff), a professional horse braider, when she was kicked in the face by a horse named Hero's Testimony (Hero) on September 11, 2009 while she was attempting to braid his tail for a horse show. The plaintiff and her husband, derivatively, commenced this action against defendants Anthony and Barbara Mule (the Mules), the owners of Hero and defendant Patricia Messina-Panzarella (Ms. Panzarella), Hero's trainer.

In the complaint, the plaintiffs allege that the defendants were negligent in, *inter alia*, failing to take proper precautions to avoid and guard against the happening of the accident, failing to inform the plaintiff that the horse had a propensity to kick and failing to properly train the horse.

The Mules and Ms. Panzarella now separately move for summary judgment on the grounds that they were not negligent as a matter of law since they had no duty of care to warn the plaintiff of the possibility of being kicked by Hero, Hero had no propensities for violence and the plaintiff assumed the risk of injury.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

It is well settled that an owner's liability for a bite or attack by a domestic animal is determined solely by the application of the rule of strict liability (*see Petrone v Fernandez*, 12 NY3d 546, 883 NYS2d 164 [2009]; *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 16 [2006]; *Collier v Zambito*, 1 NY3d 444, 775 NYS2d 205 [2004]). Where "the owner of a domestic animal... either knows or should have known of that animal's vicious propensities [the owner] will be held [strictly] liable for the harm the animal causes as a result of those propensities.... Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation" (*id.* at 446, 775 NYS2d at 207 [internal quotation marks and citations omitted]). The Court of Appeals has held that "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" (*id.* at 447, 775 NYS2d at 207).

In support of their motion for summary judgment, the Mules submit a copy of the pleadings, affidavits from Christopher Miller, a veterinarian who examined Hero, Joe Collura, Hero's farrier and Virginia Mule, Hero's primary rider. In addition, the Mules submit copies of their deposition transcripts as well as those of plaintiff and defendant Ms. Panzarella.

In his affidavit, Christopher Miller, a veterinarian, states that he examined Hero on October 12, 2010 and at no point during the examination, which included the lifting and manipulation of Hero's tail and hind quarters, did Hero exhibit any vicious or aggressive behavior.

Joe Collura, Hero's farrier, states in his affidavit that he has been shoeing Hero every 4-6 weeks for 2½ years. Shoeing a horse involves lifting each leg, asking the horse to hold steady for a period of time with one foot raised and working closely to the tail and hind quarters. Hero has never kicked or otherwise acted aggressively. He is a calm, well-mannered horse.

In her affidavit, Virginia Mule, the Mules' daughter, states that she has been the primary rider of Hero since he was purchased in 2008. She has ridden him several times per week and has groomed, brushed and tended to him. In addition, she has braided his mane and tail on several occasions. He has never exhibited any dangerous or vicious conduct which has made her afraid of him. He is sweet-tempered and reliable. Anytime that she has fallen off of him, the fall was not caused by any misconduct on his part, but rather was due to rider error. No one who has come into contact with him has ever complained about his behavior. Hero's usual braider, Steve Krauss, could not attend the show to braid Hero. After the accident, Virginia braided Hero's tail for the show without incident.

The plaintiff testified at her deposition that she has been braiding horses for years. She is aware of the risks associated with braiding a horse including being kicked. Defendant Ms. Panzarella normally uses Steve Krauss to braid the horses which she trains. However, because Steve was not able to attend the show, he asked the plaintiff if she would fill in for him. She agreed, met with Ms. Panzarella and informed her that she could braid Hero for the show. She had never braided Hero before. Neither Ms. Panzarella nor the Mules told her anything about Hero's disposition prior to her braiding him. She had seen Hero being braided and groomed in the past and she had never noticed anything unusual about him. The trainer or the owner usually informs the braider if a horse is a biter or a kicker. On the day of the incident, she took Hero out of the stall and cross-tied him. She then braided his forelock and mane. After braiding his tail for approximately 10 minutes, she went to take hold of another piece of hair for the braid and he tightened his tail bone to his rear-end and lowered his rear-end down. She backed up, placed her left hand on his rear-end and reassured him that everything was okay. At that point, he started dancing with his back legs and then he lifted both of his legs into the air and kicked her in the face with his left leg. After the accident, she was told by a woman who had witnessed Hero's lessons that he could be ornery in that he had a tendency to explode, kick out and buck. The plaintiff testified that in her opinion, Hero has a propensity to kick because he kicked her without any hesitation. She believes that Ms. Panzarella knew that Hero was a kicker. She also testified that it is widely known in the horse community that Ms. Panzarella has a tendency not to disclose a horse's disposition. For example, Ms. Panzarella sold a horse to a person and did not disclose that he had a nasty disposition. The plaintiff further testified that she saw a picture on the internet of Hero throwing Virginia Mule off of him during the show after the incident occurred.

Ms. Panzarella testified at her deposition that she has been training horses and riders for 21 years. She has been taking care of Hero since April 2008. She retained the plaintiff to braid Hero. It is her responsibility to tell a braider if a horse was sensitive with respect to its tail because she knows the horse. If a horse was sensitive, she would inform the braider so that the braider would not get hurt. Prior to the incident, Hero had never kicked while his tail was being braided, and no one ever informed her that he was funny about his tail or about being touched. Virginia Mule braided Hero's tail after the incident. The plaintiff sent the Mules a bill for the braiding of Hero's mane after the incident. Virginia Mule fell off Hero at the show on the day of the incident due to rider error. Ms. Panzarella also testified that one of the horses that she had sold had a bucking history and she informed the buyer of this before he purchased the horse.

Defendant Anthony Mule testified at his deposition that he and his wife own Hero. He observed Hero being braided a few times and he never witnessed any problems. Ms. Panzarella hired all of the braiders, including the plaintiff. Hero has never had a problem with kicking. He has seen his daughter fall off of Hero a few times and she fell at the show due to rider error. No braider has ever informed them that Hero had a kicking habit or was sensitive with respect to his tail.

Defendant Barbara Mule testified at her deposition that Hero has never had a problem with being braided. Her daughter has braided him. She and her husband would pay the braiders. Ms. Panzarella would hire and talk to the braiders. Ms. Mule testified that she never spoke to anyone following the incident about Hero being sensitive in the rear when he was being braided. Hero has never kicked out before. She permitted her daughter to braid him after the incident because she trusted the horse. She and her husband paid the plaintiff for braiding Hero's mane.

In support of her motion for summary judgment, Ms. Panzarella submits an affidavit from Karen DaPrato, a horse farm owner who originally found Hero and evaluated him for Ms. Panzarella and an affidavit from Diane Keegan, an employee of the stable where Hero is boarded during the winter months. Ms. DaPrato states that in 2008, she spoke to Ms. Panzarella about obtaining a horse for an inexperienced young rider. She found Hero for Ms. Panzarella and evaluated him. Ms. Panzarella also evaluated him. Hero never exhibited any dangerous or aggressive behavior during her evaluation or Ms. Panzarella's evaluation, which included riding Hero.

In her affidavit, Ms. Keegan states that she is an employee at the horse farm where Hero has been boarded during the winter months since March 2008. Hero has been tended to, ridden and exercised and has never exhibited any bad or aggressive behavior.

In opposition to both motions for summary judgment, the plaintiffs assert that Hero had a heightened sensitivity at his tail and was a kicker, and that this was known or should have been known by the defendants, and that they should have informed the plaintiff of this. The plaintiffs also argue that the doctrine of assumption of risk is not applicable to this action. In support of these arguments, the plaintiffs submit a sworn statement from Bridget Kennedy, a professional braider and an affidavit from Amanda Topping, the owner of a horse farm in Bridgehampton, New York. In her sworn statement, Ms. Kennedy states that after the incident occurred, she heard defendant Barbara Mule tell defendant Ms. Panzarella that she knew that Hero was "funny about his tail" and that she "guess[ed] [she] should work

with it more.” In her affidavit, Ms. Topping stated that she has worked with horses for over 30 years. It is her experience that horses react differently under circumstances of discomfort or uncertainty. It is customary in the horse industry for trainers, riders and owners to convey and disclose all information relative to a horse’s propensities which should be known to the braider prior to braiding especially if the propensities pose a risk of danger and injury so that the braider can take proper precautions to ensure her safety. Ms. Topping stated that based on the plaintiff’s deposition testimony, it is her professional opinion that Hero demonstrated a propensity to be a kicker under circumstances of discomfort or uncertainty since he kicked without any hesitation. A horse’s usual reaction when it is experiencing discomfort during braiding is to retreat. However, here, Hero’s reaction was to kick instead of retreating. A propensity to kick manifests itself at a young age and should have been known to the owner, trainer and rider.

In reply, the Mules assert that the plaintiff had some knowledge of Hero’s disposition prior to the incident because she testified that she had seen Hero braided and groomed prior to the incident and did not notice anything unusual about him. The Mules further argue that a single isolated incident does not make a horse a kicker and that the plaintiff failed to establish that Hero had a propensity to kick. Furthermore, Ms. Topper’s affidavit is not based on personal knowledge since she never observed or interacted with Hero.

In further reply, Ms. Panzarella asserts that Ms. Topping’s affidavit is conclusory, Hero did not exhibit vicious propensities before the accident and Ms. Kennedy’s sworn statement was inadmissible hearsay.

It should be noted at the outset that the Mules correctly assert that, as owners of Hero, they cannot be held liable in negligence for any injuries sustained by the plaintiff (*see Petrone v Fernandez, supra*). However, they can be held strictly liable (*id.*). Thus, their argument that they had no duty to warn the plaintiff of any vicious propensities which Hero had is without merit because so long as they knew or should have known of Hero’s vicious propensities, they can be held strictly liable for any harm that he caused as a result of those propensities (*Collier v Zambito, supra* at 446, 775 NYS2d at 207). Furthermore, the Court finds no merit to Ms. Panzarella’s assertion that she did not have a duty to warn the plaintiff of any vicious propensities which Hero may have had especially in light of the fact that Ms. Panzarella hired the plaintiff and that it was her responsibility, as Hero’s trainer, to tell a braider if a horse was sensitive with respect to its tail because she knows the horse and if she knew that a horse was sensitive, she would inform the braider so that the braider would not get hurt.

It is well settled that the doctrine of assumption of risk is a viable defense to both a cause of action for strict liability against the owner of the animal (*see Pisciotto v Parisi*, 155 AD2d 422, 547 NYS2d 352 [2d Dept 1989]; *Smith v Sapienza*, 115 AD2d 723, 496 NYS2d 538 [2d Dept 1985]) and a cause of action for negligence against an individual (*see generally Kirkland v Hall*, 38 AD3d 497, 832 NYS2d 232 [2d Dept 2007]). While generally the doctrine of assumption of risk applies in those instances where a person engages in a sport or recreational activity, such as horseback *riding*, because “a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation” (*Kirkland v Hall, supra* at 498, 832 NYS2d at 232 [internal quotation marks omitted]), it has been held that a woman who had been working

with horses for years and was aware that horses may try to bite and kick, assumed the risk of being kicked in the head while she was assisting in a grooming technique that she had never before performed (see *Smith v Hunting View Farm*, 265 AD2d 928, 695 NYS2d 802 [4th Dept 1999]).

After reviewing the deposition transcripts and affidavits submitted by the Mules, the Court finds that the Mules and Ms. Panzarella met their initial burden of demonstrating that there was no evidence that Hero had aggressive or vicious propensities (see *Bard v Jahnke*, 6 NY3d 592, 815 NYS2d 15 [2006]; *Kreigar v Cogar*, 83 AD3d 1552, 921 NYS2d 767 [4th Dept 2011]; *Vichot v Day*, 80 AD3d 851, 913 NYS2d 838 [3d Dept 2011]) and that the plaintiff, who had worked with horses for years and testified that she was aware of the risks involved in braiding horses—including being kicked—assumed the risk of being kicked by Hero while she was braiding his tail (see *Smith v Hunting View Farm*, *supra*).

In opposition, the plaintiffs failed to raise a triable issue as to whether the defendants knew or should have known of Hero’s vicious propensity to kick and whether or not the plaintiff assumed the risk of being injured while braiding. While the plaintiffs submit a sworn statement from Ms. Kennedy in which she states that she overheard defendant Barbara Mule informing defendant Ms. Panzarella that she knew that Hero was “funny about his tail” and that she “guess[ed] [she] should work with it more,” this statement is inadmissible hearsay. While inadmissible hearsay may be considered in opposition to a motion for summary judgment, it is insufficient to defeat the motion for summary judgment if it is the only evidence submitted (see *Roldan v New York University*, 81 AD3d 625, 916 NYS2d 162 [2d Dept 2011]). Here, the only other evidence submitted is an affidavit from Ms. Topping, who has no personal knowledge of Hero, and based her opinion that Hero had a propensity to kick and that this propensity should have been known by the defendants, solely on the plaintiff’s deposition transcript in which the plaintiff testified that Hero kicked her without any hesitation while she was braiding him. Thus, Ms. Topping’s affidavit was insufficient to defeat the defendants’ motions for summary judgment (see *Levitt v County of Suffolk*, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]).

In any event, even if the plaintiffs established that the defendants knew that Hero had vicious propensities, as stated above, the plaintiff, an experienced braider who had worked with horses for years and testified that she was aware of the risks associated with braiding, assumed the risk of being kicked by Hero while braiding his tail (see *Smith v Hunting View Farm*, *supra*) and has failed to raise a triable issue of fact as to her assumption of the risk.

Accordingly, the Mules and Ms. Panzarella’s respective motions for summary judgment dismissing the complaint insofar as asserted against them are granted.

Dated: 9/22/11 \_\_\_\_\_ .S.C.  
 X  FINAL DISPOSITION         NON-FINAL DISPOSITION