

**Pappas v City of New York**

2011 NY Slip Op 33590(U)

December 7, 2011

Supreme Court, Queens County

Docket Number: 9915/09

Judge: Kevin Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10  
Justice

-----X  
Mary Pappas and Douglas Pappas,

Plaintiffs,  
- against -

Index  
Number: 9915/09

The City of New York; County of Queens;  
New York City Police Department; John Does  
#1 through 5, names being fictitious and  
said persons being unknown members of the  
New York City Police Department; New York  
City Fire Department; Does #6  
through 10, names being fictitious and said  
persons being unknown members of the New  
York City Fire Department; Queens County St.  
Patrick's Day Parade & Cultural Committee;  
Jamaica Bay Riding Academy; David I.  
Lichtenstein; Mark S. Mima; Bryan Bernath;  
and Bryan's Auto Parts, East, Inc.,

Motion  
Date: 9/27/11  
Motion  
Cal. Number:  
26, 27, 28, 29  
Motion Seq. No.:  
2, 3, 4, 5

Defendants.

-----X  
Jamaica Bay Riding Academy, Inc.,

Third-Party Plaintiff,

- against -

Elizabeth Mina,

Third-Party Defendant.

-----X

The following papers numbered 1 to 90 read on this motion by defendants Bryan Bernath (Bernath) and Bryan's Auto Parts East, Inc. (Bryan's Auto) for summary judgment dismissing the complaints and all cross claims filed against them in this action and in another action entitled *Elizabeth Mina, etc. v Jamaica Bay Riding Academy, et al.*, pending in this court under Index No. 21470/2009 (Action No. 2); a cross motion by defendant Queens County St. Patrick's Day Parade & Cultural Committee (Parade Committee) for the same relief on its behalf; a separate motion by defendant/third-party plaintiff Jamaica Bay Riding Academy, Inc. s/h/a Jamaica Bay Riding Academy (Jamaica Bay) for summary judgment dismissing the complaints and all cross claims and counterclaims asserted against it in this action and Action No. 2; a separate

motion by plaintiff in Action No. 2 for leave to amend her complaint, for other related relief, and to compel discovery; and a separate motion by defendant Dr. David Lichtenstein in Action No. 2 for summary judgment dismissing the complaint and all cross claims against him in said action.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-13
Order to Show Cause - Affidavits - Exhibits.....	14-17
Notice of Cross Motion - Affidavits - Exhibits...	18-21
Answering Affidavits - Exhibits.....	22-67
Reply Affidavits.....	68-90

Upon the foregoing papers it is ordered that the motions and cross motion are consolidated for the purpose of disposition and are determined as follows:

By order dated November 25, 2009 and entered December 1, 2009, this court directed that this action and Action No. 2 be jointly tried. The actions were not consolidated and retained their separate identities and separate index numbers. (CPLR 602[a].) As such, relief sought in Action No. 2 must be requested by motion made in that action, under Index No. 21470/2009, returnable before the assigned judge. (Uniform Rules for Trial Cts [22 NYCRR] § 202.8[a].) Accordingly, the motion by plaintiff in Action No. 2 for leave to amend her complaint and compel discovery, the motion by defendant Lichtenstein for summary judgment in Action No. 2, and the parts of the remaining motions and the cross motion that are for summary judgment in Action No. 2, are denied without prejudice.

That branch of the motion by Jamaica Bay for summary judgment in this action is denied as untimely. (CPLR 3212[a].) On October 13, 2010, Justice Martin E. Ritholtz so ordered a stipulation providing that motions for summary judgment be made returnable not later than March 22, 2011. Jamaica Bay's motion was not returnable until April 13, 2011. The untimely motion was made without seeking leave of court and Jamaica Bay failed to show good cause for the delay in making the application. (CPLR 3212[a]; see, *Brill v City of New York*, 2 NY3d 648 [2004]; *Van Dyke v Skanska USA Civ. Northeast, Inc.*, 83 AD3d 1049 2<sup>nd</sup> Dept. [2011]; *Anderson v Kantares*, 51 AD3d 954 2<sup>nd</sup> Dept.[2008].)

The branches of the motion by defendants Bernath and Bryan's Auto and the cross motion by defendant Parade Committee for summary judgment in this action are being entertained on the merits. Plaintiff Mary Pappas alleges that she sustained personal injuries while walking in the Queens County St. Patrick's Day Parade in Rockaway Beach on March 1, 2008, when she was struck by a horse

that was being ridden in the parade by defendant Lichtenstein. Defendant Parade Committee was the organizer of the parade while defendant Lichtenstein and his horse were part of an equestrian unit identified in the line of march prepared by the Parade Committee as "Bryan's Auto Equestrian Unit." Defendant Bernath was one of six riders in the equestrian unit. It is alleged by plaintiffs that the injuries sustained by Mary Pappas resulted from the negligent acts and/or omissions of defendants.

The evidence in the record establishes that defendant Bernath was not negligent in the riding of his horse in the parade, and that he, individually, did not cause or contribute to the subject accident. While the sequence of events leading up to the collision with Mary Pappas is in dispute, only two horses and riders are implicated under either version of the facts. Neither Bernath nor the horse he was riding was involved in the occurrence. Thus, Bernath may not be held liable to plaintiffs. (See generally, *One Beacon Ins. Co. v CMB Contr. Corp.*, 84 AD3d 902 2<sup>nd</sup> Dept.[2011]; *Nozine v Anurag*, 38 AD3d 631 2<sup>nd</sup> Dept.[2007].)

The attempt to impose liability on defendant Bryan's Auto is also misplaced. The proof submitted demonstrates that the parade was made up of various units which applied to the Parade Committee for permission to participate. Although the six equestrians therefore entered the parade as a unit named "Bryan's Auto Equestrian Unit," the evidence shows that the unit was not an organized or existing group but merely a loose collection of friends and/or acquaintances who joined together for the purpose of entry into the parade. A similar group made up of mostly the same riders had participated in the parade each year since 2000 under various unit names. With the exception of defendant Bernath, the riders in the unit were not shareholders, officers or employees of Bryan's Auto. Defendant Bryan's Auto did not have the authority to regulate the selection of the horses or the riders or to control the actions of the riders before or during the parade. Under these circumstances, Bryan's Auto did not owe a legal duty to plaintiffs. (See, *Purdy v Public Administrator of County of Westchester*, 72 NY2d 1, 8 [1988]; see also, *Fox v Marshall*, 88 AD3d 131, 135-136 2<sup>nd</sup> Dept.[2011].) In the absence of a duty, there can be no breach and without a breach there is no liability. (See, *Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *Fox*, 88 AD3d at 135; *Fernandez v Elemam*, 25 AD3d 752, 753 2<sup>nd</sup> Dept.[2006].)

Accordingly, that branch of the motion by defendants Bernath and Bryan's Auto for summary judgment in this action is granted, and the complaint and all cross-claims are dismissed as against them.

Although the deposition testimony of the parties may raise issues of fact as to whether any of the riders in the equestrian

unit were drinking alcohol and/or smoking marijuana before and/or during the parade, defendant Parade Committee has demonstrated that it did not know of any such activities, and no issue of fact as to its knowledge has been raised in opposition. It is undisputed that the Parade Committee's rules prohibited any alcohol use. The Parade Committee did not have any ability to control the participants' activities prior to the parade, and did not witness nor receive any reports of alcohol or drug use during the parade. The Parade Committee obtained a permit for the parade from the New York City Police Department (NYPD) and its representatives attended two planning meetings with Community Affairs officers from the local precinct to discuss security and crowd control issues. The security functions at the parade were directed and controlled by the NYPD, which had more than 100 officers on duty at the parade, while the Parade Committee assigned members and volunteers in the staging area to organize the line of march and placed spotters along the parade route to monitor the progress of the parade. On this record, the Parade Committee took reasonable measures to deal with issues of disorderliness and security at the parade, and did not breach any duty it owed in this regard. (See generally, *Maheshwari v City of New York*, 2 NY3d 288 [2004]; *Yule v Town of Huntington*, 204 AD2d 439 2<sup>nd</sup> Dept.[1994].)

Insofar as plaintiffs' claim against the Parade Committee arises from the behavior of the horses involved in the incident, plaintiffs' right to recover for the Parade Committee's alleged negligence in permitting the horses to be in the parade, and/or in failing to provide proper supervision for the horses, can be no greater than the ability of a party injured by a domestic animal to proceed against the owner of the animal or the party that controlled the premises where the animal was present. A cause of action for injuries inflicted by a domestic animal may only succeed where the animal had vicious propensities and the animal's owner or the party in control of the premises knew or should have known of such propensities. (See, *Petrone v Fernandez*, 12 NY3d 546 [2009]; *Bard v Jahnke*, 6 NY3d 592 [2006]; *Collier v Zambito*, 1 NY3d 444 [2004]; *Appel v Charles Heinsohn, Inc.*, 59 NY2d 741 [1983], *affg* 91 AD2d 1029 2<sup>nd</sup> Dept.[1983]; *Tennant v Tabor*, \_\_\_ AD3d \_\_\_ 4<sup>th</sup> Dept., 2011 NY Slip Op 8034 [4<sup>th</sup> Dept 2011]; *Krieger v Cogar*, 83 AD3d 1552 4<sup>th</sup> Dept.[2011]; *Jones v Pennsylvania Meat Market*, 78 AD3d 658 2<sup>nd</sup> Dept.[2010]; *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707 2<sup>nd</sup> Dept.[2008]; *Claps v Animal Haven, Inc.*, 34 AD3d 715 2<sup>nd</sup> Dept.[2006].) The term "vicious propensities" has been held to include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation. (See, *Collier*, 1 NY3d at 446; *Appel*, 59 NY2d 741, *affg* 91 AD2d at 1030; *Krieger*, 83 AD3d at 1553; *Claps*, 34 AD3d at 716.)

Defendant Parade Committee has made a prima facie showing that it was not aware, nor should it have been aware, that the two horses involved in the accident had any vicious propensities. (See, *Christian*, 54 AD3d at 708; *Ali v Weigand*, 37 AD3d 628 2<sup>nd</sup> Dept.[2007]; *Claps*, 34 AD3d at 716.) The Parade Committee neither saw nor received any complaints of abnormally aggressive or dangerous behavior on the part of the horses. The opposing parties have failed to raise a triable issue of fact as to whether the Parade Committee had notice of any vicious propensities. (CPLR 3212[b]; see, *Christian*, 54 AD3d at 708; *Ali*, 37 AD3d at 629.) Accordingly, that branch of the cross motion by defendant Parade Committee that is for summary judgment in this action is granted, and the complaint and all cross-claims are dismissed as against it.

Dated: December 7, 2011

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KEVIN J. KERRIGAN, J.S.C.