

**Lee v Hardtke**

2014 NY Slip Op 32969(U)

November 18, 2014

Supreme Court, New York County

Docket Number: 157942/12

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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IN LEE,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No.  
157942/12

ERIN HARDTKE,

Defendant.

-----X

HON. ANIL C. SINGH, J.:

Defendant/dog owner moves for summary judgment dismissing the complaint pursuant to CPLR 3212, contending that plaintiff has submitted no evidence that defendant's dog demonstrated vicious propensities prior to the bite.

The material facts are as follows.

Defendant Erin Hardtke owns a mixed-breed beagle/Jack Russell terrier named Gem. The dog weighs approximately 20 to 25 pounds.

Defendant took Gem for a walk on a four-foot leash on West 58<sup>th</sup> Street in Manhattan on November 8, 2012. As plaintiff In Lee walked past defendant, Gem bit plaintiff's calf.

Plaintiff commenced the instant action by filing a summons and verified complaint on November 8, 2012, asserting causes of action for assault, negligence and intentional infliction of emotional distress. The complaint seeks

compensatory and punitive damages.

Defendant exhibits the transcript of her deposition (Motion, exhibit G). Ms. Hardtke stated that she was living in Chicago in the Fall of 2007. One day, she saw Gem at a local “doggy daycare,” where Gem was a “foster dog” up for “adoption.” To adopt Gem, defendant had to go to the City of Chicago’s Department of Animal Care and Control. She was told that Gem was about one-and-a-half years old. Plaintiff did not know anything about Gem’s prior owner, or why Gem was put up for adoption.

Defendant stated that Gem is now about eight years old. According to defendant, the dog has a timid, shy, reserved and sweet disposition. Defendant stated further that Gem had not previously bitten anyone or any dog; had never demonstrated any kind of violent tendencies; and had never exhibited aggressive tendencies toward other people.

Defendant stated that from the time she adopted Gem up until the incident, Gem’s disposition was not wild or hostile. On the contrary, the dog was friendly. She was a “very constant mellow dog.” When someone Gem did not know came to defendant’s apartment, the dog would bark. Finally, defendant asserted that the dog had never before tried to bite a stranger.

In opposition, plaintiff notes that defendant has offered no affidavits from

neighbors or others who knew the dog attesting to the animal's alleged gentle and tolerant manner. Pointing out that defendant had adopted the dog when it was about one-and-a-half-years old, defendant stated during her deposition that she did not recall what she was told about the dog during the adoption process, and she cannot recall making any inquiry as to the dog's background. Thus, defendant has no knowledge as to whether or not her dog exhibited any vicious propensities before she acquired it.

Plaintiff notes, too, that defendant had moved to New York City a few days prior to the incident, and Gem became "more reserved" after the move. During her deposition, defendant stated that the animal "may look away" if someone on the street came up to her and tried to pet her, and in defendant's apartment the dog would go into a corner to "just be alone" (Hadtke deposition, pp. 19, 20, 21, 22). Plaintiff asserts that defendant knew that her pet was in new, strange surroundings, that her personality had recently changed, and that the dog was unsure of itself, wary of strangers and afraid.

Finally, plaintiff cites defendant's deposition testimony that the animal had growled at other dogs and had growled at people (Hardtke deposition, pp. 35-36).

#### Discussion

The standards for summary judgment are well settled. "The 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 eliminate any material issues of fact from the case” (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion (id.) Summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (Alvarez v. Propect Hosp., 68 N.Y.2d 320, 324 [1986]). Moreover, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining (Zuckerman v. City of New York, 49 N.Y.2d 557, 560 [1980]). “In determining whether summary judgment is appropriate, the motion should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (Garcia v. J.C. Duggan, Inc., 180 A.D.2d 579, 580 [1<sup>st</sup> Dept., 1992], citing Assaf v. Ropog Cab Corp., 153 A.D.2d 520, 521 [1<sup>st</sup> Dept., 1989]). The court’s role is “issue-finding, rather than issue-determination” (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957] (internal quotations omitted)).

A plaintiff may not recover for injuries sustained in an attack by a dog unless he or she establishes that the dog had vicious propensities and that its

owner knew or should have known of such propensities (Collier v. Zambito, 1 N.Y.3d 444, 446 [2004]). A dog's vicious propensities may be evidenced by prior vicious behavior such as biting, growling, snapping and baring its teeth, and an inference that the owner is aware of such a propensity may be raised where, for example, the dog is maintained as a guard dog or is restrained by the owner out of a concern that the dog will put others at risk of harm (id.).

In Gervais v. Laino, 112 A.D.3d 545 [1<sup>st</sup> Dept., 2013], the First Department observed:

No court has found that a dog's growling at one or two other dogs is sufficient to establish vicious propensities, and the Third Department has specifically held that growling and baring of teeth, even at people, is insufficient to give notice of a dog's vicious propensities. Here, the evidence, which establishes only that defendant's dog growled at two other dogs, one of whom had bitten her, and never growled or bared her teeth at any people, is insufficient to raise an issue of fact as to the dog's vicious propensities. Accordingly, defendant is entitled to summary judgment dismissing the complaint.

(Gervais, 112 A.D.3d at 545).

Here, the Court finds that defendant established her initial burden on summary judgment by submitting the transcript of her deposition establishing that she acquired the dog, a beagle/Jack Russell terrier, as a pet from a doggy daycare and owning him for approximately five years prior to the incident without knowledge of any vicious propensities. The burden then shifted to plaintiff to

demonstrate a triable issue of material fact.

In short, the Court finds that plaintiff has not come forth with sufficient evidence that could support an inference that the dog had any vicious propensities.

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted, and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs.

The foregoing constitutes the decision and order of the court.

Date: 11/18/14  
New York, New York

  
Anil C. Singh

HON. ANIL C. SINGH  
SUPREME COURT JUSTICE