

**Davis v Peyron**

2020 NY Slip Op 35363(U)

December 16, 2020

Supreme Court, Albany County

Docket Number: Index No. 900453-20

Judge: Denise A. Hartman

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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BARBARA DAVIS,

Plaintiff,

DECISION AND  
JUDGMENT

-against-

Index No. 900453-20

CHRISTOPHER M. PEYRON AND DOROTHY  
PEYRON,

Defendants.

---

HON. DENISE A. HARTMAN, AJSC

APPEARANCES

ANDERSON, MOSCHETTI & TAFFANY, PLLC  
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Attorneys for Plaintiff  
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LAW OFFICES OF JOHN TROP  
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Hartman, J.

Plaintiff Barbara Davis commenced this action against defendants Christopher and Dorothy Peyron seeking damages for injuries she sustained when she was bitten by defendants' dog. Defendants move for summary judgement, contending that they had no knowledge of vicious propensities.

In New York, dog-owners cannot be held liable for negligence when their dog bites someone, but they will be held strictly liable for dog-bite injuries if they knew or should have known of the dog's dangerous propensities. Here, defendants have established prima facie that they had no reason to believe their dog had vicious propensities, and plaintiff has not raised a question of fact to the contrary. Defendants' motion for summary judgment is therefore granted.

### **Background**

Defendants own a large dog named Frankie, a 120-pound Great Dane-Mastiff mix. They have owned the dog, more than six years old at the time of the incident, since he was a puppy. Frankie grew up with their three daughters, now 15, 19, and 21 years old. The parties have submitted no evidence that Frankie has ever bitten anyone. But since he was two years old, defendants have generally confined Frankie in their bedroom or in the guest room above the garage during parties and events when guests are in the house. According to defendants, they confine Frankie when others are in the house

because not all people are comfortable around dogs. And a couple of times, defendants have heard Frankie growl when one of their daughters tried to hug him or put their arms around his neck.

Plaintiff gave detailed deposition testimony about the incident and her experience with the Peyrons and Frankie. She testified that in late September 2019, she met Mrs. Peyron at her home in Clifton Park to discuss a house-cleaning arrangement. While there, Frankie was present. Mrs. Peyron told her that Frankie was very friendly and asked plaintiff if she was afraid of dogs; plaintiff replied that she was not, as she owns a "Rotti." Frankie accompanied Mrs. Peyron as they walked through the house during their twenty-minute meeting. Mrs. Peyron hired plaintiff to clean their split-level home every two weeks beginning October 1, 2019.

When plaintiff arrived on October 1, 2019 for the first cleaning, Mr. and Mrs. Peyron were both at home. Plaintiff worked from about 8:05 a.m. until 7:00 or 7:30 p.m. Frankie was unconfined but remained with Mr. or Mrs. Peyron most of the time. A couple of times, Frankie came into the family room where plaintiff was cleaning, but she paid little attention as she was focused on her work. She did not hear any barking or growling from him.

Plaintiff returned to clean the Peyrons' house on the morning of October 16, 2019. Only Mrs. Peyron and Frankie were present. As she is cleaning the house, a friend of Mrs. Peyron's arrived. Mrs. Peyron said she was going out

and asked her if it was okay to leave Frankie unconfined. Plaintiff replied that she had never been in the Peyrons' home with Frankie alone and was not sure how Frankie would react. So Mrs. Peyron confined Frankie in a room upstairs and left, while plaintiff continued to clean.

Mrs. Peyron's daughter and Mrs. Peyron came home within a few minutes of each other at about 3:00 or 3:30 p.m. Frankie was brought down to the kitchen-family room area, which were separated by an island. Mrs. Peyron and her daughter were in the kitchen while plaintiff was finishing damp-mopping the wood floor in the family room. Frankie was lying on the rug in the family room. As plaintiff moved to mop the wood floor on one side of the carpet, Frankie bit her ankle. She yelled, moved to the other side of the couch, and tried to lift a coffee table to put onto the couch to prevent the dog from coming toward her. As she did so, Frankie bit her right arm, causing extensive wounds.

Mrs. Peyron's deposition testimony was largely consistent with plaintiff's deposition testimony. On the day of the incident, she had taken Frankie on a four-mile walk in the morning, then confined him in the guest room while she left for a time with a friend. When she returned, she brought Frankie down to the kitchen to be with her and her daughter. The kitchen and family room are open to each other. Mrs. Peyron offered plaintiff a cup of coffee, but plaintiff declined and continued working. When Mrs. Peyron heard plaintiff scream in the adjacent family room, she ran to pull Frankie away.

Mrs. Peyron testified that Frankie had never been aggressive, but he had been in a couple scuffles with off-leash dogs. "Once or twice" over the past couple of years she has observed Frankie growl, a low rumble, when their youngest daughter, now age 15, hugged him, she believed because he did not want her to put her arms around his neck.

Mr. Peyron gave similar deposition testimony: that Frankie had never been aggressive with people or dogs; that they generally confined Frankie when visitors were in the house because not all people like dogs; that Frankie had a couple scuffles with other dogs; and that he had heard Frankie growl a non-threatening growl when their youngest daughter tried to give him a bear hug a month or so before the incident.

Finally, according to plaintiff's companion, on the day after the incident when he came to retrieve plaintiff's belongings, Mr. Peyron told him that the dog-bite incident was a game changer and that Frankie had recently growled at his daughter when she had tried to hug him.

### **Analysis**

On a motion for summary judgment, the movant has the "burden to establish a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Olsen v Campbell*, 150 AD3d 1460, 1460-61 [3d Dept 2017]),

quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotations omitted]; see CPLR 3212 [b]). “In the context of a defendant’s motion for summary judgment in a dog bite or attack case, the ‘defendant bears an initial burden to demonstrate that, prior to the incident giving rise to the lawsuit, he or she was without knowledge that the animal possessed any vicious or dangerous propensities’” (*Olsen v Campbell* at 1461 quoting *Gannon v Conti*, 86 AD3d 704, 705 [3d Dept 2011]). “Only if the defendant meets this initial burden, does the burden then shift to the plaintiff ‘to raise a triable question of fact as to whether defendants knew or should have known that [their] dog had . . . vicious propensities’” (*id.* quoting *Buicko v Neto*, 112 AD3d 1046, 1047 [3d Dept 2013]). “Once such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities” (*id.* quoting *Collier v Zambito*, 1 NY3d 444, 448 [2004]). “In this procedural setting, all evidence must be viewed in the light most favorable to [the] plaintiff” (*id.* quoting *Czarnecki v Welch*, 13 AD3d 952, 953 [2004]).<sup>1</sup>

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<sup>1</sup> The Court of Appeals has repeatedly adhered to New York’s rule that owners of domestic animals may only be held strictly liable if they knew or should have known of their animal’s vicious propensities, and rejected arguments that the owners may be held liable for negligence (see *Doerr v Goldsmith*, 25 NY3d 1114, 1116 (2015); *Petrone v Fernandez*, 12 NY3d 546, 547-551 (2009); *Bard v Jahnke*, 6 NY3d 592, 596-598 (2006); see *id.* at 602-603 [R.M. Smith, J. dissenting]; cf. *Hewitt v Palmer Veterinary Clinic, PC*, 2020 NY Slip Op 05975 [2020] [claims for negligence causing dog-bite injuries may be asserted against third parties]).

Here, defendants have satisfied their burden of demonstrating prima facie that they had no knowledge or reason to know of vicious propensities. It is undisputed that in their six years of owning Frankie, he had never bitten or otherwise harmed a person or even another dog. Nor is there evidence that he barked or growled at anyone in a threatening way.

In opposition, plaintiff posits that defendants' knowledge of vicious propensities is implied from defendants' admission that they confine their dog to a room when guests are in the house. Plaintiff relies further on defendants' deposition testimony that their dog has occasionally growled at one of the children. The Court does not find that these circumstances raise a genuine issue of fact about whether defendants knew that Frankie had vicious propensities.

“[A] triable issue of fact as to knowledge of a dog's vicious propensities might be raised--even in the absence of proof that the dog had actually bitten someone--by evidence that it had been known to growl, snap or bare its teeth. Also potentially relevant is whether the owner chose to restrain the dog, and the manner in which the dog was restrained (*Collier v Zambito*, 1 NY3d at 446-447). For example, the keeping of a dog as a guard dog may give rise to an inference that an owner had knowledge of the dog's vicious propensities (*id.* at 447). However, the size, breed, or gender of the dog alone is insufficient to raise a question of fact as to vicious propensities (*see Miletich v Kopp*, 70 AD3d 1095,

1096 [3d Dept 2010]; *Staller v Westfall*, 225 AD2d 885, 885 [3d Dept 1996]; *cf. Bard v Jahnke*, 6 NY3d 592, 598-599 [2006] [mere fact that animal was a breeding bull insufficient to show dangerous propensities]).

Here, as in *Collier*, the evidence that defendants routinely confined Frankie is insufficient to show knowledge of violent propensities. Defendants kept Frankie as a family pet, not as a guard dog. The uncontroverted testimony is that defendants confined their dog out of respect to guests who may be uncomfortable around dogs, particularly large dogs. Such testimony is consistent with plaintiff's own testimony that Mrs. Peyron allowed Frankie to remain unconfined while they walked around the house only after asking plaintiff how she felt about dogs and plaintiff responded that she was fine, as she owned a rottweiler herself, and then confining Frankie on the day of the incident when plaintiff said she was not comfortable being alone with Frankie while she was house-cleaning. There is simply "no evidence that [Frankie] was confined because the owners feared he would do any harm to their visitors" (*Collier*, 1 NY3d at 447).

Nor is the defendants' deposition testimony that Frankie had growled at defendant's daughter a couple of times when she tried to hug him enough to raise a question of fact about vicious propensities. Defendants, who witnessed the behavior, characterized Frankie's growl as non-threatening and merely to show his displeasure with their daughter's placement of her arms around his

neck. No testimony was elicited that Frankie snarled or bared his teeth on these occasions. That Frankie previously growled on these isolated occasions reflects normal canine behavior; it does not raise a question of fact about whether Frankie had previously exhibited vicious propensities (*see Illian v Butler*, 66 AD3d 1312, 1315 [3d Dept 2009] [isolated growling incident not enough to raise triable issue]; *Brooks v Parshall*, 25 AD3d 853, 854 [3d Dept 2006] [same]; *Rose v Heaton*, 39 AD3d 937, 939 (3d Dept 2007) [same]; *cf. Hamlin v Sullivan*, 93 AD3d 1013 (3d Dept 2012)) [dog's rambunctious barking and jumping is "typical canine behavior" insufficient to raise triable issue]).

The Court acknowledges that plaintiff suffered serious dog-bite injuries, but after engaging in comprehensive discovery, plaintiff has been unable to adduce evidence to raise a triable issue of fact as to whether defendants knew or should have known that their dog had vicious propensities which would give rise to strict liability.

Accordingly, it is hereby

**ORDERED AND ADJUDGED** that defendants' motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and judgment of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for defendants shall promptly serve notice of entry on all other parties entitled to such notice.

Dated: Albany, New York

December 16, 2020



HON. DENISE A. HARTMAN

Acting Justice of the Supreme Court

Papers Considered



12/18/2020

1. Defendants' Notice of Motion, dated October 1, 2020, Affirmation in Support, Memorandum of Law and Exhibits A through E annexed thereto
2. Plaintiff's Attorney Affirmation in Opposition, dated October 20, 2020, and Exhibits A through B annexed thereto
3. Plaintiff's Affidavit of Richard Arcuri, sworn to on October 19, 2020
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Here, defendants have satisfied their burden of demonstrating prima facie that they had no knowledge or reason to know of vicious propensities. It is undisputed that in their six years of owning Frankie, he had never bitten or otherwise harmed a person or even another dog. Nor is there evidence that he barked or growled at anyone in a threatening way.

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