

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

PAYAL SUCHDEV,

Plaintiff,

-against-

MENAKSHI SINGH and MOHAN SINGH,

Defendants.

Index No:1656/05

Motion Date: 11/1/06

Motion Cal. No.: 30

The following papers numbered 1 to 9 read on this motion by defendant for summary judgment dismissing the complaint

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is granted and the complaint is dismissed.

This is an action to recover for personal injuries plaintiff sustained on December 19, 2004 when she was bitten by the defendant's, MENAKSHI SINGH's (hereinafter Mona), dog at the premises owned by her father, defendant MOHAN SINGH. The premises are a single family home in which MOHAN SINGH, his wife and two of his sons occupy the first floor and his son Arun (hereinafter Ronnie), his daughter Mona and Ronnie's friend Newang occupy the second floor apartment. In her complaint plaintiff alleges that on December 19, 2004 she was visiting her friend Ronnie, that his sister Mona, Ronnie and two friends were gathered in the livingroom. While Mona was feeding snacks to the dog, the dog turned and bit plaintiff in the face.

Although not separately numbered, the complaint alleges two causes of action. The first sounding in strict liability based upon the allegation that the defendants knew or should have known that the dog had vicious propensities; and the second sounding in common-law negligence.

In Collier v. Zambito, 1 NY3d 444 [2004], the Court of Appeals reaffirmed the long standing rule that the owner of a domestic animal, a dog in this case, will be held strictly liable for an injury caused by the dog when the owner either knows or should have known of the dog's vicious propensities and the injury is a result of those propensities (see also Hosmer v. Carney, 228 NY 73, 75[1920]). The court went on to say that an animal can be found to have vicious propensities even when its behavior would not be "considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm ... albeit only when such proclivity results in the injury giving rise to the lawsuit" (Collier v. Zambito, 1 NY3d at 447). "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'" (Collier v. Zambito, 1 NY3d at 447 quoting Dickson v. McCoy, 39 NY 400, 403 [1868]). The determination of whether a dog has vicious propensities and whether the owner knows of such propensities involves the consideration of proof of such factors as the dog's prior similar acts, the tendency to growl, bare its teeth, snap at or jump up on people, the fact that the dog was kept for protection or as a guard dog, and whether the dog was restrained and how it was restrained (Collier v. Zambito, supra; Parente v. Chavez, 17 AD3d 648 [2005]).

Although the First and Second Departments have allowed recovery for injury caused by domestic animals based on common-law negligence even in the absence of any proof of the owner's knowledge of prior vicious propensities (see, Colarusso v. Dunne, 286 AD2d 37 [2001]), the Court of Appeals in Barde v. Jahnke, 6 NY3d 592 [2006] has recently held that recovery for injuries caused by domestic animals may proceed only under strict liability standards and not on a common-law negligence theory (see also Morse v. Colombo, 31 AD3d 916 [2006]; Mindel ex rel. Mindel v. Jones, 16 AD3d 857 [2005], lv denied 5 NY3d 705 [2005]). Accordingly, the plaintiff's complaint, insofar as it asserts a cause of action for common-law negligence, is dismissed.

The defendants have established, prima facie, their entitlement to summary judgment by submitting the deposition testimony of the parties which demonstrated that the dog did not have vicious propensities or "a proclivity to act in a way that puts others at risk of harm", and that the defendants lacked any knowledge of any such "proclivities" (see Longstreet v. Peltz, ___ AD3d ___, 821 NYS2d 899 [2006]; Cohen v. Kretzschmar, 30 AD3d 555 [2006]; see also Malpezi v. Ryan, supra). In this regard,

defendants submitted, inter alia, the plaintiff's deposition where she stated that she had been to Mona's apartment on several occasions, that although the dog was usually in Mona's room, on two occasions the dog was in the room with her, that she was not afraid of the dog and the dog had never attacked, or growled or bit her before. Where as here the defendants have established their entitlement to summary judgment, the burden shifts to the plaintiff to come forward with competent evidence to raise a triable issue of fact (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v. City of New York, 49 NY2d 557, 562 [1980]). This the plaintiff failed to do.

In opposition, the plaintiff asserts that the dog had a history of aggressive behavior and that the defendants knew of such behavior and failed to disclose it. In support of this claim plaintiff submitted the veterinary clinic's medical records of the dog which contains an entry dated November 17, 2004 "bleeding ear tip," " bite wound from October 31, 2004". Plaintiff argues that based upon this evidence alone, the motion should be denied, because the defendant's deposition testimony that the dog had a "cut" on the ear not a bite, is in conflict with the note which raises questions of credibility as to the defendants' knowledge of the dog's vicious propensities. Plaintiff's argument is without merit. Whether the dog had a cut or a bite on his ear, however, is insufficient to raise a question of fact as to whether the dog has vicious propensities, where as here there is no evidence of the medical basis for the entry and no evidence that the dog was involved in a fight in which it was the aggressor (see Marshall v. Darmody-Latham, 11 AD3d 992 [2004]). Under the circumstances, the defendants' motion to dismiss the complaint is granted.

Dated: November 24, 2006
D# 28

.....
J.S.C.