

• SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden  
Index Number : 109184/2004

PART II

MARSH, DOLORES

vs  
FEMINA, JERRY DELLA

Sequence Number : 002  
AMEND

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/22/06  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to ~~for~~ amend

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with attached memorandum Decision + Order

RECEIVED  
APR 25 2006  
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FILED  
MAY 02 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 17, 2006

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

[Handwritten Signature]

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 11

-----X

DOLORES MARSH,

INDEX NO. 109184/04

Plaintiff,

-against-

JERRY DELLA FEMINA and JUDY LICHT,

Defendants.

-----X

JOAN A. MADDEN, J.:

Plaintiff moves for an order granting her leave to serve and file an amended complaint to seek punitive damages. Defendants Jerry Della Femina ("Della Femina") and Judy Licht ("Licht") oppose the motion, which is granted for the reasons set forth below.

#### Background

This action seeks to recover damages in connection with a dog bite incident. The complaint alleges that defendants were negligent and should be held strictly liable for plaintiff's injuries since they were aware of the dog's vicious propensities.

On August 4, 2003, plaintiff attended an afternoon party thrown by the defendants at their house located at 24 Drew Lane, Easthampton, New York. While standing in defendants' pool area, plaintiff was bitten on her left ankle by defendants' dog, Oreo,

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a nine year-old cockapoo weighing approximately twenty-five pounds.

Defendants testified that on the date of the incident, they may have put Oreo in the bedroom around noon, prior to guests arriving. Defendants' testimony indicated that they did not warn guests of the presence of a dog, and that they did not instruct staff or family members to place Oreo back in the bedroom if she got out. Defendants testified that their property line is surrounded by an electric fence to prevent their dogs<sup>1</sup> from going into the street and onto the beach. However, defendants stated that they only put collars, which render the fence effective, on their dogs sometimes.

Neither defendant could recall seeing Oreo outside at the party prior to the incident. Licht testified that the bartender informed her that Oreo had been sleeping under a table near the pool area immediately before the dog bit the plaintiff.

According to medical reports submitted by plaintiff, plaintiff received a four centimeter laceration on her left, lower leg that pierced through her skin, and underlying muscle. Plaintiff suffered a bone infection, nerve damage and permanent scarring. She underwent two ambulatory surgeries, spent five days hospitalized and a month in outpatient treatment, and also has

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<sup>1</sup>The record indicates that defendants owned dogs other than Oreo.

received weekly occupational therapy sessions beginning in July 2004. Plaintiff is also asserting psychological damage resulting from the incident. Plaintiff testified that on the day of the incident, Licht told her that Oreo had bitten before.

The record contains evidence that before the incident, Oreo had bitten three other people at or in the vicinity of the defendants' house in Easthampton. Pietro Faulisi ("Faulisi"), an employee of the United Parcel Service (UPS), testified that he was bitten on the right ankle by Oreo on March 27, 1998, while delivering a package to the defendants' house. Faulisi stated that he went to the hospital, received a shot, but sought no further treatment for the injury. He further testified that when he returned to defendants' house on other occasions to deliver packages, that Oreo was out loose "ninety percent of the time," that the dog was "trying to charge after me" and wanted to "take another bite out of me." As a result, Faulisi testified that he left the packages for defendants at the end of the driveway so he would not be bitten again.

Steven Noethiger ("Noethiger"), also an employee of UPS, testified that he was bitten by Oreo outside the defendants' house in August of 2000. Noethiger stated that he received four or five puncture wounds on the back of his right calf that caused him to bleed, and that after the incident he went into the house

where the housekeeper cleaned the area where he was bitten. He did not seek any medical treatment for his wounds.

Andrea Pearlman ("Pearlman") testified that she was bitten by Oreo in the summer of 2002 while walking on the beach in front of defendants' home. She testified that Oreo, who was with defendants' housekeeper and was not on a leash, "lunged at me and bit me through my pants." Although the bite did not break the skin and she did not receive any medical treatment, Pearlman testified that the bite hurt, and resulted in bruising to her leg.

Licht testified at her deposition that she had no knowledge of Oreo biting anyone prior to the incident involving the plaintiff. However, as indicated below, there is evidence in the record from which it could be inferred that both of the defendants knew about some or all of the three prior incidents.

Faulisi testified that he initiated legal action against the defendants for the 1998 incident and the parties agreed to a settlement on December 7, 2001. Noethiger testified that on the day he was attacked, he showed the wounds to the defendants' housekeeper who brought him inside the house, and gave him materials to clean and bandage his wounds. Pearlman testified that after Oreo bit her, defendants' housekeeper took her phone number. According to Pearlman, after defendants failed to contact her, she visited their house and Licht said she had heard

Pearlman was bitten by the dog. Pearlman stated that after she told Licht about her ruined pants, Pearlman wrote her a check for one hundred dollars. Pearlman also testified that she showed her bruise from the dog bite to Licht's son and probably to Licht.

In addition, on April 29, 1998, a month after the March 27, 1998 Faulisi incident, The Independent, a local newspaper, published an article written by Della Femina entitled "Oreo Confesses (Sort Of)" in which Della Femina indicates that he knows that Oreo is guilty of biting a UPS man on the ankle. In the article, Della Femina writes that although he knows that Oreo is guilty, "we can't do anything about it" and that "everything seems to be going along fine in my household and I can't think of finding and breaking in another dog at this time. So Oreo stays and from time to time he will bite and lie and get away with it." In connection with the action brought by Faulisi, Della Femina testified that the article was satirical and purely fictional, and had no relation to the Faulisi incident.

In seeking leave to amend the complaint to add punitive damages, plaintiff asserts as the record shows defendants engaged in conduct which demonstrated a wanton, willful, and reckless disregard for the safety of the plaintiff in that defendants failed to take any precautions to protect their guests, despite their knowledge that there were three victims who had been bitten by Oreo.

Defendants counter that their purported conduct did not rise to the requisite egregious, or reprehensible actions aimed at the public required to support a request for punitive damages. Defendants also argue that any purported prior awareness of the previous dog bite incidents is relevant only to the extent that plaintiff claims that defendants are strictly liable for plaintiff's injuries.

#### **Discussion**

Under CPLR 3025 (b), motions to amend are freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit. Thomas Crimmins Contracting Co., Inc. v. City of New York, 74 NY2d 166 (1989). Defendants do not claim prejudice or unfair surprise in their opposition to plaintiff's motion to amend. Therefore, the issue is whether the proposed amendment is of sufficient merit.

To demonstrate merit of the proposed amendment, the "proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as matter of law." Daniels v. Empire-Orr, Inc., 151 AD2d 370, 371 (1<sup>st</sup> Dept. 1989) (citations omitted). When the proponent meets this initial burden, "the merit of the alleged pleading

must be sustained ...unless the alleged insufficiency or lack of merit is clear and free from doubt." Id.

Courts do not award punitive damages in cases of ordinary negligence. See Schrage v. Hatzlacha Cab Corp., 13 AD3d 150 (1<sup>st</sup> Dept 2004). Instead a punitive damage claim in a tort action must be based on evidence of conduct which exhibits "a wanton or reckless disregard of [a] plaintiff's rights" and acts which are "grossly negligent and reckless." Giblin v. Murphy, 73 NY2d 769, 772 (1998). "An act is wanton and reckless when done under circumstances showing heedlessness and utter disregard for the rights and safety of others." Gruber v. Craig, 208 AD2d 900, 901 (2d Dept 1994) (internal citations omitted; see 1B PJI 2:278 (2006 ed)).

On the other hand, in a tort action, unlike a claim based on a contractual relationship, it is not necessary to show that the harm was aimed at the general public "so long as the very high threshold of moral culpability is satisfied." Giblin v. Murphy, 73 NY2d at 773 (citations omitted); Pirrotti & Pirrotti LLP v. Estate of Warm, 8 AD3d 545, 546 (2d Dept 2004). See also U.S. Trust Corp. v. Newbridge Partners, LLC, 278 AD2d 172 (1<sup>st</sup> Dept 2000) (trial court properly denied motion to dismiss punitive damage request where plaintiffs alleged that defendants' misconduct during the formulation of competing business included

a mass resignation from plaintiffs' corporation and improperly contacting plaintiffs' clients); Gruber v. Craig, 208 AD2d 900 (upholding award of punitive damages where defendant, despite having received notice from plaintiff that the smell of gas was emanating from her stove, and in violation of building codes, failed to repair gas pipe, and as a result plaintiff was injured in an explosion); Rahn v. Carkner, 241 AD2d 585, 586 (3<sup>rd</sup> Dept. 1997) (granting leave to amend to add a demand for punitive damages where demand was not plainly lacking in merit based on allegations that defendant struck plaintiff's car for a second time when fleeing an accident scene); compare Rocanova v. Equitable Life Assur. Socy. of U.S., 83 NY2d 603, 613 (1994) (for conduct to warrant the recovery of punitive damages in a breach of contract action it must be shown, inter alia, that it was part of a pattern of similar conduct directed at the public at large).

In this case, although defendants deny knowledge of any prior incidents in which Oreo bit others, as indicated above, reasonable inferences can be drawn from the record that defendants were aware that their dog had previously bitten three individuals without provocation, that at the party where plaintiff was bitten they permitted Oreo to run loose without precautions and, thus, consciously disregarded the safety of those on or near their property. Moreover, despite Della Fema's testimony that the article about Oreo's biting the UPS man was

fictional, based on the similarity of facts and the one-month interval between the Faulisi incident and the article, a trier of fact could reasonably infer that Della Femina was aware of and writing about the actual incident. Furthermore, a trier of fact could reasonably infer from the article a lack of intent by defendants to take any measures to prevent further incidents involving Oreo's biting, and thus their deliberate disregard for the safety of others.

Next, notwithstanding Licht's denial, in view of Pearlman's testimony regarding the \$100 check she received from Licht, a reasonable inference could be drawn that Licht was aware of the third incident. In addition, defendants' knowledge as to the first incident can be inferred from the fact that Faulisi commenced a lawsuit against them, which was later settled on their behalf.

Based on the foregoing, ample evidence exists from which the trier of fact could infer that defendants were aware of Oreo's tendency to bite, but deliberately failed to prevent further incidents. Defendants are correct that evidence of defendants' knowledge is relevant and material to plaintiff's theory of strict liability, which requires a determination that Oreo has vicious propensities and that defendants knew or should have known about such propensities. See Collier v. Zambito, 1 NY3d 444 (2004). However, the evidence is equally relevant and

material to plaintiff's claim for punitive damages, specifically as to the question of whether defendants' knowledge of Oreo's tendencies and their conscious and deliberate failure to take any precautions to prevent future incidents, constitutes "wanton and reckless" conduct in "utter disregard for the rights and safety of others." Gruber v. Craig, 208 AD2d at 901.

Next, while there is no binding precedent on point, a lower court has awarded punitive damages in a dog bite case where the owner knew of the dog's vicious propensity and the owner's conduct showed a reckless disregard for the rights and safety of others. See Nardi v. Gonzalez, 165 Misc2d 336 (City Ct. of Yonkers 1995). In Nardi, the court awarded punitive damages where a large dog with known vicious propensities mauled a neighbor's smaller dog. The defendant's dog was a German Shepard which had attacked one of the neighbor's two small dogs on two prior occasions, causing severe injuries. Even though the owner had installed a fence to enclose the dog prior to a third attack on a second dog belonging to the same neighbor, the court found that punitive damages were appropriate and necessary "to deter other dog owners from failing to protect humans and other animals from vicious and dangerous dogs." Id.

In Zager v. Dimilia, 138 Misc2d 448 (Just. Ct. Village of Pleasantville 1988), the court held that punitive damages were not warranted in another dog-attacks-dog case because there was

no proof that the dog had known vicious propensities, and the dog owner's failure to control his dog amounted only to mere negligence.

Similarly, in Amado v. Estrich, 182 AD2d 1109 (4<sup>th</sup> Dept 1992), the Appellate Division, Fourth Department, held that punitive damages were not appropriate where an unleashed dog knocked a plaintiff off his bicycle. The Fourth Department wrote that "[d]efendants' disregard of or indifference to (the dog's) roaming does not rise to the level of egregious conduct required for the recovery of punitive damages." Notably, however, there was no indication in Amado, that the dog had previously injured a person or animal.

Here, as in Nardi, there is evidence that the defendants knew of prior incidents before the dog attack at issue. Moreover, the record suggests that on the date of the incident, Oreo was permitted to roam the party despite these incidents. As discussed above, defendants' knowledge of Oreo's propensity to bite is not only relevant to whether plaintiff's can recover under a strict liability theory, but is also relevant to plaintiff's claim for punitive damages, i.e. whether defendants consciously and recklessly disregarded the danger posed by Oreo.

This court recognizes that in many instances punitive damages would be an inappropriate remedy for injuries arising out of a dog bite. However, as a motion to amend the pleading

requires only a prima facie showing of merit, this court concludes that under the unique circumstances of this case, plaintiff has pleaded legally sufficient facts establishing that the amendment adding a request for punitive damages is not plainly lacking in merit, and defendants have failed to controvert this showing. See Thomas Crimmins Contracting Co., Inc. v. City of New York, 74 NY2d 166.

Accordingly, plaintiff's motion to amend is granted.

**Conclusion**

In view of the above, it is

ORDERED that the motion to amend is granted to include a demand for punitive damages; and it is further

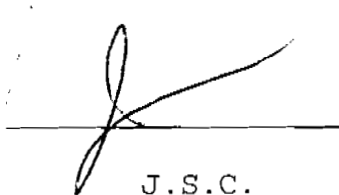
ORDERED that proposed amended complaint annexed to plaintiff's motion shall be deemed served upon service of a copy of this order with notice of its entry; and it is further

ORDERED that the parties shall appear for a status conference in Part 11, room 351, 60 Centre Street, on May 4, 2006 at 9:30 am.

Dated: April 17, 2006

**FILED**  
MAY 02 2006  
NEW YORK  
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ENTER:

  
J.S.C.