

SCAHW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

ALEXANDRA SUSLOPAROVA,

Plaintiff,

- against -

**MARESA LAINO, MARIA LAINO and
VESNA OELSNER,**

Defendants.

**TRIAL/IAS PART 16
NASSAU COUNTY**

**Motion Seq. # 001, 002
Motions Date: 2/19/03**

INDEX NO.: 00-18760

The following papers having been read on the motion [numbered 1-4]

Notice of Motion (Defendant Oelsner). 1

Notice of Cross-Motion (Defendant Maria Laino) 2

Affirmation in Opposition (Plaintiff). 3

Reply Affidavit (Defendant Oelsner). 4

The plaintiff in this action seeks to recover damages for personal injuries she sustained as a result of a dog-bite on New Years day, January 1, 2000. The defendant Vesna Oelsner and the defendant Maria Laino move for summary judgment in their favor pursuant to CPLR § 3212. The separate motions are disposed of as follows:

Facts

The plaintiff was an overnight guest of friends who were living on unfenced property in Center Island that was owned/managed by defendant Oelsner. Upon arrival, and while there during the next day, the plaintiff noticed an unleashed dalmatian and an unleashed retriever who were barking at persons they encountered. She was bitten in the face by the same unleashed dalmatian ("Igor" or "the dog") the next day, January 1, 2000, while outside of the house smoking a cigarette together with other persons.

Igor was owned by defendant MARESA LAINO and escaped, about a week earlier, while unleashed, from a nearby home in Center Island owned by her mother,

defendant MARIA LAINO. The dog was at that time in the care and custody of Luca, MARESA LAINO'S younger brother.

It is basic that on a motion for summary judgment it is incumbent upon the moving party to establish an entitlement to judgment as a matter of law. In that event, the party opposing the motion must demonstrate the existence of a triable and material issue of fact. See *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320.

Defendant Oelsner's Motion

The event complained of took place on defendant Oelsner's property. As a general rule, premise owners owe a duty of "reasonable care under the circumstances whereby foreseeability shall be a measure of liability" (*Basso v. Miller*, 40 N.Y.2d 233, 241; *Scurti v. City of New York*, 40 N.Y.2d 433; *Barker v. Parnossa, Inc.*, 39 N.Y.2d 926) to their visitors and guests. "A landowner must act as a reasonable man in maintaining his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Smith v. Arbaugh's Rest.*, 469 F.2d 97, 100 (C.A.D.C.1972)). More narrowly framed, the viability of the complaint against defendant Oelsner hinges on what she did or should have done to protect the plaintiff from an unleashed and potentially vicious dog that had escaped, a week earlier, from other premises on Center Island.

Inasmuch as this defendant has shown that she had no prior custody or control of the dog, she has demonstrated her *prima facie* entitlement to judgment in her favor as a matter of law. The plaintiff, on the other hand, has failed to come forward with proof in evidentiary form that is sufficient to raise a reasonable inference of liability on defendant Oelsner's part. The plaintiff's contention that triable issues of fact with respect to the liability of all of the defendants exist by reason of the unleashed dog's size and strength, its vicious propensities, and pictures of the missing dog posted on Center Island, cannot apply to defendant Oelsner.

Any such notion applied to the circumstances here would unreasonably obligate the Center Island property owners to erect fences and alert everyone upon learning of a loose and potentially vicious animal. The instant claim is unlike, *Rhabb v. City of New York Hous. Auth.*, 41 N.Y.2d 200, where injury to a child in a public playground was deemed foreseeable because over a prior four month period a shaggy black dog chased and attempted to bite children in the playground.

Defendant Maria Laino's Motion

Similarly, the plaintiff contends that triable issues of fact with respect to the liability of each of the other named defendants arise from their ownership, custody or control of the dog because, as such, they knew or should have known of Igor's vicious propensities considering his size and strength. In that regard, the plaintiff has failed to come forward with proof in evidentiary form that the dog had ever bitten anyone or exhibited any vicious propensities. *See, Grubenmann v. Wagner*, ___ A.D.2d ___, 751 N.Y.S.2d 550; *Lugo v. Angle of Green, Inc.*, 268 A.D.2d 567; *Marino v. Assogna*, 268 A.D.2d 569.

Moreover, pointing to the alleged severity of the attack, the plaintiff argues that that the Laino family, who had custody and control of Igor during a 9 year period, knew or should have known about his vicious propensities. Nonetheless, absent additional corroborative evidence that prior to this incident the dog demonstrated any fierce or hostile tendencies, the argument is speculative and is insufficient to defeat the motion for summary judgment. *See, Strunk v. Zoltanski*, 62 N.Y.2d 572; *Maher v. C & A Auto Parts, Inc.*, 279 A.D.2d 459, 460; *Luts v. Weeks*, 268 A.D.2d 568; *Altmann v. Emigrant Sav. Bank*, 249 A.D.2d 67; *Arcara v. Whytas*, 219 A.D.2d 871.

However, the plaintiff points additionally to a local ordinance (Oyster Bay Town Code § 103-2) that "No person, who owning or otherwise having possession, custody, dominion or control on any dog shall allow such dog, whether licensed or not, off the premises of such person without being restrained by an adequate leash and under the immediate and full control of the owner or person in charge thereof." She relies on the dog owner's (MARESA LAINO) pre-trial deposition that the dog was running freely without any leash most of the time and without immediate and full control of the owner, or any other person, to attribute vicarious liability to the defendant, MARIA LAINO.

The court finds that no factual claim exists against Maria Laino who, though not an owner allegedly exerted dominion or control over Igor. However, Maria Laino was not only out of the country, but also removed and thus her conduct further attenuated by her daughter's ownership and appropriate delegation of control to her 24 year old brother,

Maria Laino's son. Additionally, there is no factual allegation of knowledge of Igor's vicious propensity, if any, to Maria Laino. However issues of fact may remain whether MARESA LAINO (who has appeared in this action *pro se*) violated the ordinance and, if so, whether such violation was a proximate cause of the plaintiff's injuries. *See, Lisi v. MRP Holdings, Inc.*, 238 A.D.2d 316. Since this court has not been presented with that issue, the claim against Maresa Laino continues

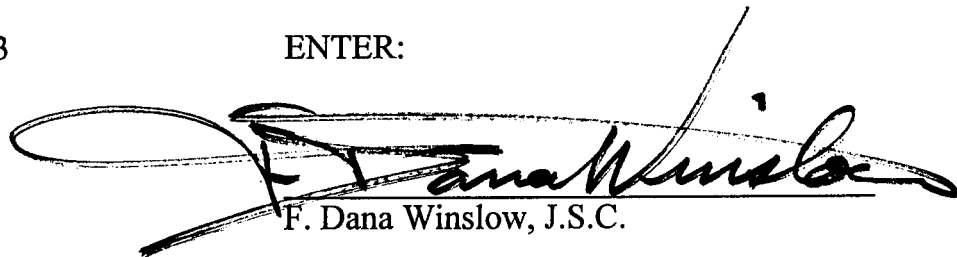
For the reasons hereinabove stated, the motion of defendant Vesna Oelsner for summary judgment is **Granted** and the Defendant Maria Laino's motion is also **Granted**.

Submit judgment on 15 days notice.

This constitutes the Order of this Court.

Dated: May 15 , 2003

ENTER:



F. Dana Winslow, J.S.C.

ENTERED

MAY 28 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE