

JUSTICE COURT: TOWN OF RAMAPO
COUNTY OF ROCKLAND: STATE OF NEW YORK

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TOWN OF RAMAPO

-against-

Petitioner,

DECISION
&
JUDGMENT
(10050423)

HI-TOR ANIMAL CARE CENTER, INC.

Respondent,
-----X

JUDGE ARNOLD P. ETELSON

This court is asked to determine whether a dog should be declared dangerous pursuant to Section 108 (24) (a) of the Agriculture and Markets Law. The case is unusual in one aspect as the respondent is an animal shelter and the alleged victim is an animal control officer from another township. The subject dog was surrendered by its owner on April 23, 2009 to respondent who has harbored it ever since and is therefore the owner pursuant to Section 108 (15).

Article 7 which deals with licensing, identification and control of dogs was amended effective in 2005. A memorandum of the New York State Assembly in support of the amendment states the "PURPOSE OR GENERAL IDEA OF BILL: to improve control over dangerous dogs through owner accountability and increased judicial leeway in determining the level of dangerousness in a dog and the proper treatment of the situation." The memorandum under "JUSTIFICATION" states that there are situations where dogs that are not actually dangerous are so categorized or dogs found to be less dangerous are bound by regulations authorizing euthanasia or permanent confinement "where obedience training, muzzling or spaying/neutering could easily deal with the problem." Undoubtedly, the amendment must have been legislated at the request of animal lovers and others concerned with unjust dangerous dog determinations. In doing so it seems that the pendulum has swung back, perhaps too far, with the consequence that the public may not be adequately protected. See People v. Jornov, 65 A.D. 3d 363, 881 N.Y.S. 2d 776 where the Appellate Division, 4th Department in its decision in modifying a euthanasia directive in a dangerous dog judgment stated that there were aggravating circumstances that should have been considered by the judge hearing the case but could not because of the language in the amendment. The court deemed it advisable to

amend the statute to afford a judge the discretion to order humane euthanasia when there are aggravating circumstances deemed by him or her to warrant such action. The case at bar does not address the "aggravating circumstances" issue, but it does deal with the issue of an underlying dangerous dog finding.

The animal control officer testified that on May 6, 2010 in the midst of leaving respondent's facility she observed Niko, the subject male dog, being restrained on a short approximate 3 foot leash by a volunteer trainer. She, the animal control officer, had prior knowledge of Niko and said "Hi, Niko" as she turned to exit the front door where upon Niko jumped up at her just after barking at her. She stated that the volunteer was sitting down with her foot on the leash.

In answer to a question of what kind of bark it was, she answered "This was, oh my god, it's going to hurt." Her further answer to "was it a growl? was it a bark?" was "It was a deep growl, bark, that normally I'm out of the truck with a pole in my hand if a dog was coming at me like that." She stated that he leaped up at her face and based upon what she had been taught, she raised her left weaker arm and her left leg. She stated that he "scared me half to death and I went into the door, put my arm up, put my knee up. It all happened so quickly and it was over." The volunteer trainer acknowledged the incident, but denied that she had her foot on the leash at that moment and denied that the officer said "hi" to Niko. She said that she pulled Niko back, that he was wagging his tail and lay down after the incident.

The officer further testified that she covered her face because she "was afraid he was going to get my face." She sustained a scratch on her left arm with her skin pealed without bleeding. She was examined at Best Care where her knee and elbow were x-rayed because she thought she twisted her arm and knee. She returned to the doctor on May 17 because she had numbness in her fingers when she held it in a certain way. She took Advil before she testified on May 27. She was not feeling pain in her knee on that date.

There were no other witnesses to the incident. The officer had observed Niko in the past jump up and bark to get people's attention.

Evidence was presented at the trial that the director of Hi-Tor initiated a color coding system after assuming her position on June 1, 2009. A green color signified that a dog was easy to handle, good with small children and adoptable. A yellow color meant that there may be an issue and that potential adoptors should be told that the dog was better suited for older

children. A red color indicated that the general public could not walk the dog, that it was aggressive and not ready for adoption and that even staff members should keep the dog away from the public. Conflicting evidence was adduced as to whether the above rules were being observed by the shelter and whether the rules were being bent, especially with regard to Niko who was presented as one of the shelter's favorites. This included a dispute as to what color had been assigned to Niko on the day of the incident and how the color code was changed from red to yellow without an evaluation sheet after the March 13 incident mentioned below.

Amidst a confused description of Niko's breed, a DNA analysis showed him to be a mix between an Alaskan Malamute, Borzoi and Russell Terrier with an adult weight predicted to be 45 to 68 pounds. At the time of the incident Niko was about two years old.

Respondent presented evidence by a certified canine trainer and evaluator and a dog trainer behavior specialist, the former staking his reputation that Niko would never bite anyone, that he is very loving and when he jumps he is trying to greet people, but needs obedience training to avoid jumping up on people. The latter gave similar testimony (without staking her reputation), that he was a happy, playful nice dog, but that there were moments in time when he might use a snap bark called a "snark" as a warning sign. Based upon her evaluation with Niko interacting with a 4 year old boy, she would not place him with a family with young children.

The animal intake form filled out by some unknown employee of the shelter stated that Niko had bitten a child, but there was no skin break. No other information was provided as the reason for the prior owner's surrender. An incident occurred at the shelter on March 13, 2010 when Niko, being restrained on a leash by the same volunteer trainer, jumped on a 5 year old boy and scratched him. No other details were provided.

There was testimony by the officer confirmed by several of the shelter's employees about a current animosity between the officer and the people running the shelter which, in addition to the history set forth in this case, appears quite clearly to be a factor in the filing of this dangerous dog complaint.

The shelter advertised Niko for adoption in a local periodical and in its web site. In its web site Niko, who is now 2 years old, is advertised as "a male lab mix about one year old, a sweet, gentle, happy dog...good on a leash...prefers older kids only because he is a strong fellow... would make a wonderful addition to any family"

Section 108 (24) (a) defines a dangerous dog as one which (i) without justification attacks a person, companion animal, farm animal or domestic animal and causes physical injury or death or (ii) behaves in a manner which a reasonable person would believe poses a serious and unjustified imminent threat of serious injury or death to one of more persons, companion animals, farm animals or domestic animals or (iii) without justification attacks a service dog, guide dog or hearing dog and causes physical injury or death.

Physical injury is described in Section 108 (28) as impairment of physical condition or substantial pain and is similarly described in Section 10 (9) of the Penal Law. Under the case law in New York the injury sustained by the officer does not rise to the level of physical injury as neither impairment of any reasonable extent nor substantial pain has been proved.

A consideration of subdivision 24 (a) (ii) is therefore necessary to make a determination whether Niko is a dangerous dog. The court did some research on who is the reasonable person, the result of which the court concludes that it is not the victim nor is it the judge. It is apparently the person who is confronted with the same fact situation of the incident as confronted the alleged victim. If that is so, it would appear that all of the opinion testimony of the expert witnesses and all of the evidence of prior acts of Niki are not germane. Expert testimony is only relevant where justification is alleged as a defense. It is not present in this case. Section 121 (4) provides that testimony of a certified applied behaviorist, a board certified veterinary behaviorist or other recognized expert shall be relevant to the Court's determination as to whether the dog's behavior was justified. Impliedly, such testimony is not germane or relevant to the threshold issue of whether the dog is dangerous, absent evidence of justification as described in subdivision 4.

If the behavior of the dog considered by the reasonable person is limited to what actually occurred at the subject incident, then the dog could have attacked other persons or animals hundreds of times in the past with or without causing physical injuries and such evidence could not be considered. The vicious propensity of dogs which forms the basis of so many reported cases in suits for damages against dog owners and in dangerous dog proceedings is therefore irrelevant to the threshold issue of a dangerous dog finding in a dangerous dog case filed pursuant to Article 7.

In the case at bar there is no evidence of provocation by the officer and no evidence as to why Niko jumped on or at the officer. Any testimony by a lay or expert witness would be speculative and, in any case, inadmissible.

The amended statute substituted "physical injury" for "harm" and also specified that the burden of proof is by clear and convincing evidence. Section 121 (2).

The reasonable person should be neither a dog lover nor dog hater. Nor should he be a person with more than the average knowledge of dog behavior.

For the reasons stated above the court finds the reasonable person standard to be problematic and in need of legislative amendment restoring in appropriate language the consideration of evidence of vicious propensity.

In determining the case at bar, the fact that the wound appears to have been a scratch rather than a bite and the further fact that this strong 50 some odd pound male dog did not continue in pursuit of the officer when held back by a female volunteer trainer who appeared to the court to be of slight build, The Court cannot by clear and convincing evidence find Niko on the day in question to be a dangerous dog.

The case of Kennet v Sossnitz, 260 A.D. 769, 1940, is of great interest in the subject of dangerous dogs. In this negligence case brought against the dog's owner plaintiff was accompanied by two friends and, leading his dog on a leash, was walking on the public sidewalk in front of premises occupied by the defendant in New York City. The dog was a St. Bernard of "prodigious" size lying unleashed in front of the steps of the premises set back about 35 feet front the street. "Suddenly the defendant's dog, moved by some secret impulse, rushed from his position at the steps and, leaping on the plaintiff, threw him to the ground. Although not muzzled at the time, the dog did not bite the plaintiff." No evidence of prior acts of vicious propensity was offered. The defense offered no testimony, its motion to dismiss the complaint on the ground that no cause of action had been established was denied and the jury found for the plaintiff rendering a substantial monetary verdict. The Appellate Division reversed the judgment and dismissed the complaint. In this 4-1 decision the Court discounted the doctrine of every dog being entitled to "one free bite," assuming it ever prevailed in New York. The Court quoted precedent that the owner is not responsible for the injury caused by his dog unless the vicious propensities of the animal are known to him or by the exercise of reasonable care the same could have been ascertained.

The court went on to say that the great size of the dog does not affect the question of the owner's liability. "It would be unreasonable and inexpedient to hold that dogs are vicious or dangerous in proportion to their size. The owner, whether the dog be large or small, is justified in assuming that he will not inflict injury upon others unless his previous behavior gives some evidence of vicious tendencies."

In a scathing dissent, Justice Dore pointed out that plaintiff was "thrown to the pavement with such violence that he is crippled for life and wholly incapacitated from employment." According to Justice Dore, the grounds in plaintiff's complaint is that defendant's negligence was that "he knew that his dog being a large animal, could by its weight and size knock down persons upon whom it leaped; and that defendant neglected to anticipate the dangers attending an unleashed and otherwise unrestrained dog in close proximity to the sidewalk." Continuing, "Liability does not depend upon whether the person charged with negligence could have foreseen the precise injury complained of; he may be held liable for that which, after the injury is complete, appears to have been a natural and probable cause of his act or omission."

The case at bar is all about the shelter's attempt to find someone to adopt Niko. Though, in the opinion of this Court, Niko cannot be found by the evidence adduced at this hearing to be a dangerous dog, respondent is certainly on notice of its potential liability in not enforcing its own rules and regulations. As far as Niko is concerned, by admission of its own witness, Niko should not be adopted by a family with small children and anyone adopting Niko should be aware of a potential jump upon a small child visiting his premises or elsewhere in a public or private location. Furthermore, in placing a dog for adoption, the shelter should be well advised to inform the adoptor of all of the relevant background of the dog, including a full disclosure of why the dog was surrendered in the first place.

Analogizing Kennet v Sosnitz with the case at bar, a friendly, frisky strong 50 pound dog can easily knock over a small child, and depending on how and on what the child lands, a serious injury could occur.

The court would be remiss if it did not express its gratitude to respective counsel for the petitioner and respondent for presenting the evidence background and animal expertise to the court. The court was especially impressed with the depth and presentation by the assistant town attorney, mostly through cross-examination of defense witnesses, which elicited the

concern that the shelter be more vigilant in assuring that their operation is adequately protecting the public. Missing dog evaluations and unavailability of the on premises security video of the incident was troublesome to the court.

Good luck to the shelter in finding a proper adoptor and best wishes to Niko.

The petition is dismissed.

The aforesaid is the decision and judgment of the court.

DATED: Suffern, New York
June 21, 2010



HON. ARNOLD P. ETELSON
TOWN JUSTICE
TOWN OF RAMAPO

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