Finkelstein Newman LLP

The Real Estate Litigation Leaders

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WHO LET THE DOGS OUT?

According to the Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, 4.7 million Americans are bitten by dogs each year. Of that number, 800,000 Americans seek medical attention and about a dozen die. With those odds, it's no wonder that dog bites receive a lot of play in our case law.

Generally, a dog's custodian may be subject to "strict liability" for injuries inflicted by the animal if the victim can establish that the dog is "vicious" and that the caretaker knew or should have known of the animal's propensities. In one reported case, for example, the court accepted evidence of a prior history of attacks on other victims as proof of these elements. In another instance, when a caretaker was able to prove that his dog had no prior record of attacking humans and that the animal had never bared its teeth or growled at anyone, the lawsuit was dismissed.

When there is conflicting evidence as to the dog's viciousness and/or a caretaker's knowledge, these issues will typically be decided by the judge or jury. Interestingly, judges are discouraged from operating under certain assumptions (or presumptions). By way of example, proof that certain dogs have been bred to be "high strung," "aggressive," and/or "territorial" will not automatically trigger the "vicious" element, nor has the presence of a "Beware of Dog" sign (in and of itself) established that the animal's custodian possessed the requisite knowledge. And, finally, an animal's mere agitation and barking when people approach have also been found to be insufficient to trigger liability.

Collier v. Zambito, a 2004 decision issued by the New York State Court of Appeals, sought to dispel some of the confusion that seems to pervade this area of the law. In that particular case, 12-year-old Matthew Collier was attacked by a beagle-collie-rottweiler mixed-breed dog named "Cecil," who had no prior history of menacing or threatening behavior. And, without such a record, our state's highest court concluded that Cecil's custodians could not be found liable for the injuries Matthew sustained. Yet, the decision carefully notes that the court was not espousing a "one free bite" standard. Rather, when a dog has allegedly perpetrated an attack, and has not previously bitten someone, courts may examine whether the animal's "viciousness" was otherwise apparent.

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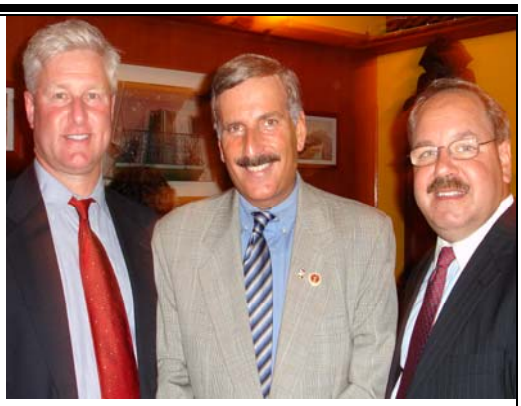
FINKELSTEIN NEWMAN HONORS LEECIA EVE



Jon Newman, Hon. David Weprin, Robert Finkelstein

On July 18, 2006, a host of civic leaders and an array of clients, friends and concerned citizens attended a firm-sponsored reception for Leecia Eve, former counsel to Senator Hillary Rodham Clinton, and former candidate for Lieutenant Governor of New York. The event also marked the formation of "SHOW UP New York," a new organization which is committed to encouraging New Yorkers, particularly young people and people of color, to participate in the democratic process by exercising their right to vote and ensuring their voices are heard.

Lucas A. Ferrara presents Leecia Eve with a $5,000 contribution on behalf of the partners and associates of the firm.

Voter turnout in New York State has recently fallen to disturbing levels, particularly during non-presidential election cycles. Since 1998, New York's rank among the 50 states has plunged from 37th to 46th. If this trend continues, voter turnout in New York could fall below 30%.

SHOW UP New York's mission is to increase voter turnout among young people and minorities, and to build a permanent base of politically involved New Yorkers.

To learn how you can help reverse voter apathy, and effect change, please visit SHOW UP's website at: www.showupny.com or call them at: 718-857-2006

LETTER TO THE EDITOR: ADVERSE–POSSESSION PROTECTION

I read your recent articles on adverse possession ("Getting Mowed By Adverse Possession," June 2006, and, "Adverse Possession: The Debate Rages On," August 2006) with considerable interest. The case you examined–*Walling v. Przybylo*–reinforces that buying or selling real estate is not an easy proposition. For sellers, it's mainly a waiting game–waiting for the buyer to obtain financing, conduct due diligence inspections, or close on a contingent sale. However, for buyers it's a different story. A buyer needs to be more proactive. The buyer not only has to inspect and finance the property, but protect it as well. That is where title insurance comes in; it safeguards the buyer/owner from unsuspected claims on title—like adverse possession. Most lenders require the purchase of title insurance in order for a buyer to close; however, the *Walling* case reinforces that it is also of utmost importance for all-cash deals.

Title insurance acts like a pillow in a real-estate transaction. You can sleep better at night with it. But title insurance is only part of what we do. For purchases, we work closely with the buyer's attorney; and for refinances, we coordinate the closing with the lender. The title company will research and solve any title problems found before the transaction can close. And that's how problems, like the adverse possession claim made in the *Walling v. Przybylo* case, can be avoided. Our staff works diligently–using the latest software–to research title issues. We then convert this information to an understandable plan for all parties to follow so that the deal gets done.

When buying property in New York, you will often encounter bumps on the road to closing. Choosing a responsible and reputable title company can make those impediments a whole lot easier to maneuver.

Steve Carvelli, Manhattan Title Agency (www.manhattantitle.com)

WHO LET THE DOGS OUT?

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Here are some recent cases that demonstrate how the law is being applied.

On the evening of September 14, 2001, a pit bull named "Oreo" bit 6-year-old Casey L. Malpezzi on the arm. Casey's mom later started a lawsuit on her daughter's behalf in the Schenectady County Supreme Court seeking monetary damages for the injuries Casey sustained. After motion practice, the Supreme Court refused to dismiss the case citing a "question of fact" as to whether Oreo's caretakers were aware of the canine's "vicious propensities."

On an appeal in the case of *Malpezzi v. Ryan*, the Appellate Division, Third Department, reversed the Supreme Court and noted as follows:

> As this Court consistently has held, "a plaintiff may not recover for injuries sustained in an attack by a dog unless he or she establishes that the dog had vicious propensities and that its owner knew or should have known of such propensities"...Here, defendant and his girlfriend testified, without contradiction, that they did not experience any problems with the dog prior to the incident with Malpezzi. Specifically, each testified that Oreo did not display any act of aggression prior to biting Malpezzi; Oreo did not bark, growl, bare his teeth or snap at, jump on or chase any person or animal, nor did they receive any complaints from anyone in the neighborhood. Such proof, in our view, is more than adequate to discharge defendant's initial burden on the motion for summary judgment, thereby compelling plaintiff to come forward with sufficient admissible proof to raise a question of fact in this regard. This plaintiff failed to do.

This outcome stands in stark contrast to what transpired in yet another dispute involving a canine with the same name. In this later case, the twenty-five pound, 9-year-old "cockapoo" (part spaniel, part poodle) is a companion to local celebs, Jerry Della Femina and Judy Licht. At a party held at their Hampton's home on August 4, 2003, this Oreo bit Delores Marsh, in the leg, causing a four-inch laceration which led to a bone infection, nerve damage and permanent scarring. Apparently, Oreo's caretakers were aware of the animal's "vicious propensities," but failed to take appropriate precautions. The decision reports that Oreo had attacked three other people prior to the Marsh encounter: Pietro Faulisi, a UPS employee who was bitten on the right ankle while delivering a package to the home; Steven Noethiger, another UPS employee, received four or five puncture wounds on the back of his right calf; and, Andrea Pearlman, who was bitten while walking on the beach in front of the defendants' home.

Since this history suggested "grossly negligent and reckless" conduct and a "wanton or reckless disregard" of Ms. Marsh's safety, the New York County Supreme Court permitted Ms. Marsh to pursue a punitive damage claim against Della Femina and Licht.

While we believe Ms. Marsh should be compensated for her pain and suffering and any expenses she incurred, we are not convinced that the defendants' exposure to a potential multi-million dollar punitive-damage recovery is entirely appropriate under the circumstances. For starters, despite Oreo's prior history of attacks, we are not certain that Della Femina and Licht were engaged in "morally culpable conduct" or guilty of other acts or omissions which trigger this rarely granted type of relief. (After all, in the scheme of things, it was only a dog bite.) We are also concerned that the court has "opened the door" for a needlessly excessive and arbitrary punishment; an outcome which could be clouded by the wealth and celebrity status of the individuals involved.

Maybe, just maybe, one Oreo *is* more than enough.

If you have any questions or comments about this article, please contact partner Jonathan H. Newman at 212-619-5400 x 205 or email him at JNewman@FinkelsteinNewman.com. To join the debate, visit us at www.nyreblog.com.

WATCH YOUR STIPULATIONS!

Agreements reached within the context of litigation are typically memorialized in written form and are known as "Stipulations of Settlement." Like any contract, these documents will be enforced in accordance with their terms, particularly in the absence of any vagueness or ambiguity. And, usually, courts will refrain from "reading into" the document or engaging in creative interpretations.

In *Aivaliotis v. Continental Broker-Dealer Corp*., the parties settled their employment-related lawsuit by way of an agreement which provided for plaintiffs to remit three payments to defendant totaling $120,000. In the event an installment was missed, the parties could "pursue their claims and counterclaims." When plaintiffs subsequently failed to remit payment, the Nassau County Supreme Court granted defendant's motion for the entry of a money judgment in the amount of $120,000 as against the plaintiffs.

Since the Supreme Court applied a remedy which had not been expressly reserved by the litigants, the Appellate Division, Second Department, vacated the judgment on appeal, noting as follows: “Contrary to the defendant's contention, its only recourse in the event the plaintiffs defaulted in their payment obligation under the stipulation was to pursue its counterclaims. Thus, the Supreme Court should not have granted that branch of the defendant's motion which was for leave to enter judgment against the plaintiffs in the settlement amount since to do so ‘impl[ied] a term which the parties themselves failed to insert’ in the stipulation.”

Caveat stipulators! Sometimes, you just may get what you bargained for.

If you have any questions or comments about this analysis, please contact partner Robert Finkelstein at 212-619-5400 x 227 or email him at RFinkelstein@FinkelsteinNewman.com. To read our take on other appellate cases, visit us at: www.nyreblog.com.

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