THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

MARGUENE ST. JUSTE,

CASE NO. 50-2004-CA-010780 XXXXMB

Plaintiff,

vs.

KELI NOWLING and CITY OF DELRAY BEACH,

Defendants.

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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW, the Defendant, CITY OF DELRAY BEACH, ("City"), by and through its undersigned counsel and submits to this Court this Memorandum of Law in Support of Defendant's Motion for Summary Judgment as to Plaintiff's Amended Complaint, and in support thereof, states as follows:

Statement Of Facts

1. On November 20, 2002, the Plaintiff, MARGEUNE ST. JUSTE, was bitten by two (2) dogs, "Fuzzy" and "Cinny", in front of Plaintiff's residence located at 615 N.E. 3rd Avenue, Delray Beach, Florida.

2. On November 20, 2002, "Fuzzy" and "Cinny" were owned by Defendant, KELI A. NOWLING, an individual.

3. On November 20, 2002, KELI A. NOWLING knowingly permitted her unleashed dogs, "Fuzzy" and "Cinny", to be off of her property located at 609 N.E. 3rd Avenue, Delray Beach, Florida.

4. On November 20, 2002, the City of Delray Beach, Florida, had in force and effect, a certain Ordinance No. 18-81 that provided for impoundment of any dogs running at large.

5. On November 20, 2002, Palm Beach County had in force and effect a certain Ordinance No. 98-22, which requires that all dogs must be restrained by a leash, chain, or other device when the dog is off of the owner's property.

6. On approximately three (3) or four (4) occasions prior to November 20, 2002, the City of Delray Beach Animal Care and Control Officer, Ginny Feldmann, had been notified that KELI A. NOWLING'S dogs "Fuzzy" and "Cinny" were running at large in the City without the restraint of a leash, chain or other device. On those occasions, Officer Feldmann arrived at 609 N.E. 3rd Avenue and saw each time that the dogs were either in owner's front yard or on front porch. Each time, Officer Feldmann collected the dogs and returned them to their owner, KELI A. NOWLING, at her home located at 609 N.E. 3rd Avenue, City of Delray Beach. Upon return of the dogs the first time, Ms. Nowling was not home, so Officer Feldmann put the dogs back inside Ms. Nowling's fenced yard. On the second and third occasion, Officer Feldmann issued Ms. Nowling a verbal warning when she returned the dogs to her in person. (See excerpts from the Deposition of Ginny Feldmann, Pages 14, lines 4-25 and 15, lines 1-12 attached hereto as Exhibit "A"). Further, the dogs had no history of biting that the City was aware of prior to November 20, 2002 and they were not classified as dangerous or vicious. (See excerpts from the Deposition of Ginny Feldmann, Pages 48, lines 25 and 49, lines 1-23 attached hereto as Exhibit "A").

ARGUMENT

Summary judgment should be granted when there is no genuine issue of material fact. *See, Allstate Insurance Company v. Powell*, 420 So.2d 113 (Fla. 4th DCA 1982). In this case, the City is entitled to summary judgment as a matter of law. The pleadings and attached exhibits demonstrate that there are no genuine issues of material fact.

I. THE CITY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE ANY DECISION REGARDING ENFORCEMENT OF THE CITY'S ORDINANCES CONSTITUTES A PLANNING LEVEL GOVERNMENTAL DECISION THAT IS IMMUNE FROM LIABILITY

In *Carter v. City of Stuart*, the Circuit Court for Martin County rendered summary judgment for the city and the plaintiff appealed. The Fourth District Court of Appeal affirmed and certified the question to the Supreme Court of Florida, which held that the City of Stuart was immune from liability for damages suffered when a dog which had escaped its confinement on private property within the city and attacked and severely injured minor a child, despite the allegation that the city failed to enforce an ordinance requiring the impoundment of dangerous dogs found running at large and that the city impoundment officer should have impounded the dog after prior incidents of biting. The Supreme Court of Florida reasoned that the City of Stuart was immune from liability because the amount of resources and personnel to be committed to enforcement of an ordinance was a policy decision of the city and the city officer made a judgmental decision on behalf of the city. *Id.* at 468 So.2d 955, 957 (Fla. 1985).

Carter is factually similar to the instant case because the Plaintiff, in the instant case, has alleged in Count II of its Amended Complaint that the City was negligent in failing to enforce applicable ordinances regarding impounding unleashed dogs running at large. (See Count II of Plaintiff's Amended Complaint attached hereto as Exhibit "B").

Further, Plaintiff has alleged that because of the City's negligence in failing to enforce applicable ordinances, the City has breached its duty to protect Plaintiff and this has resulted in Plaintiff's injuries. (See Exhibit "B"). The City admits that its Animal Care and Control Officer did respond to the complaints of KELI A. NOWLING'S dogs "running at large" on approximately three (3) to four (4) occasions prior to Plaintiff's encounter with the dogs on November 20, 2002. Further, the City admits that on all of those prior occasions where the City responded to complaints that Ms. Nowling's dogs were loose, the City's Animal Care and Control Officer did return the animals ("Fuzzy" and "Cinny") to Ms. Nowling rather than impound the animals. Therefore, there is no issue of fact.

Even if there were an issue of material fact as to the City, however, the City is entitled to summary judgment as a matter of law because any decision regarding enforcement of its dog control ordinance constituted a discretionary decision that is immune from tort liability under *Trianon Park Condominium Assoc. v. City of Hialeah*, 468 So.2d 912 (Fla. 1985).

II. THE CITY OWED PLAINTIFF NO DUTY.

The City owed Plaintiff no duty because there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals. In addition, there is no common law duty to prevent the misconduct of third persons. *See, Trianon Park Condominium Assoc. v. City of Hialeah*, 468 So.2d 912, 918 (Fla. 1985) (citing Restatement (Second) of Torts §315 (1964)). How a governmental entity, through its officials and employees, exercise its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of

governance, for which there has never been a common law duty of care. *Id.* at 919. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials, as well as the discretionary authority given fire protection agencies to suppress fires. *Id.* This same discretionary power to enforce compliance with the law is given to regulatory officials...*Id.* In the instant case, the City, through its Animal Care and Control Officer, Ginny Feldmann, owed Plaintiff no duty. Further, the City has no common law duty to prevent the misconduct of third persons; in this case, KELI A. NOWLING, the owner of the dogs. *See, Trianon Park, supra* and § 767.04, *Fla. Stat.* (2004). Therefore, the City cannot be liable for failure to enforce its ordinance since a city owes no tort duty to any specific individual to enforce its laws and is not liable to any individual due to its failure to do so. *See, Trianon Park, Id.* at 919; *Everton v. Willard*, 468 So.2d 936, 938 (Fla. 1985); and *Carter v. City of Stuart, Supra* at 957.

III. FLORIDA LAW IMPOSES STRICT LIABILITY UPON DOG OWNER; NOT CITY

Finally, Florida law imposes strict liability upon "the dog owner of any dog that bites any person while such person is on or in a public place, or lawfully on or in a private place, regardless of the former viciousness of the dog or the owners' knowledge of such viciousness". *See*, § 767.04, *Fla. Stat.* (2004). In this case, the facts are indisputable that the Plaintiff was lawfully outside of her residence at 615 N.E. 3rd Avenue, Delray Beach, Florida, when Ms. Nowling's dogs bit her. Therefore, Ms. Nowling, the owner of the dogs, should be held responsible for the actions of her dogs; not the City.

Conclusion

The City is entitled to summary judgment in this case as a matter of law. Florida law is clear that the City owed Plaintiff no special or common law duty and that the City is immune from liability for failing to enforce its ordinances. Further, according to Florida law, the dog owner is strictly liable for any injuries resulting from her dogs biting another person who is upon a public place. Therefore, based on the foregoing, there is no genuine issue of material fact as to the Defendant, CITY OF DELRAY BEACH, but even if there were, the City is entitled to summary judgment as a matter of law.

WHEREFORE, the Defendant, CITY OF DELRAY BEACH, respectfully requests that this Court grant the City's Motion for Summary Judgment as to Count II of Plaintiff's Complaint.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to: **Brian W. Smith, Esq.**, 1615 Forum Place, Suite 4-C, West Palm Beach, Florida 33401 by first class United States mail this day of December, 2005.

OFFICE OF THE CITY ATTORNEY
CITY OF DELRAY BEACH, FLORIDA

By: ____________________
Terrill C. Barton, Esq.
Assistant City Attorney
Fla. Bar No. 524646
R. Brian Shutt, Esq.
Assistant City Attorney
Fla. Bar No. 0009611
200 N.W. 1st Avenue
Delray Beach, Florida 33444
(561) 243-7090