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

HON Joan A. Madden

PART 11

Index Number : 113556/2009

TAVARES, ANA PAULA

VS.

PERL, ROBERT

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 6/2/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order.

Dated: January 17 2012

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

----------X

ANA PAULA TAVARES and ANDREW ROSEN,

Plaintiffs

- against -

ROBERT PERL, JUDITH PERL and SYLVIA BULLETT,

Defendants.

----------X

INDEX #: 113556/09

JOAN A. MADDEN, J

In this personal injury action arising out of a fall from a horse, defendants Robert Perl ("R. Perl"), Judith Perl ("J. Perl"), and Sylvia Bullett ("Bullett"), move for summary judgment dismissing the complaint against them on the grounds that (i) recovery is barred by the doctrine of assumption of the risk, (ii) defendants had no notice of the horse's dangerous or vicious propensities, and (iii) defendants did not breach any duty of care. Plaintiffs Ana Paula Tavares ("Tavares") and her husband, Andrew Rosen ("Rosen") oppose the motion, which is denied for the reasons set forth below.

Background

In this action, plaintiffs seek to recover damages for personal injuries Tavares sustained on October 18, 2008, as a result of falling from a horse on the Perl's property, located at 59 Silver Hollow Road, Willow, New York. At the time of the accident, Bullett was an employee of the Perls.

During her deposition, Tavares admitted to having some experience with horseback riding and athletic activity. Tavares testified that she first rode a horse at the home of a relative or friend around the age of ten or twelve in her native country of

Brazil. She rode on one occasion when she was thirteen or fourteen and then rode every two to three years when she was on vacation. Tavares stated that she never had "horse lessons" (Tavares dep. at 48). She believes that she rode western-style with a pommel.[1]

Tavares testified that prior to the 2008 accident, she had never ridden a horse through a forest area or grassy field and always rode on trails, except that she rode on the beach three times. She could not remember the particular occasion, but she had a memory of being atop a horse that was stubborn and not as smooth as she would have liked. Tavares testified that she has ridden a horse to trot and gallop. She estimates that she rode ten to twelve times total between her first time riding at age ten and the accident date.

Tavares testified that the Perls invited her and her husband to ride with them in October 2008, and that it was the first time that they had been to the Perl's estate since the Perls acquired horses.

Tavares testified that she went riding around 1:00 PM. Tavares stated that Bullett and R. Perl asked her about her riding style and she responded that she used her right hand, which she believed to be western-style. She testified that Bullett and R. Perl were going to give her a different horse than the one she ended up riding, but that they switched horses because the other horse did not have a western saddle. According to Tavares, it was Bullett who told her she should ride the horse named Walker. Bullett and R. Perl explained that the horse she was originally going to ride only rode English-style.[2]

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[1] Western-style riding is a style of horseback riding in which the rider holds the reins with one hand and controls the horse's direction by lightly pressing a rein against the horse's neck. The western saddle has a prominent pommel topped by a horn, which was traditionally used for holding a lariat.

[2] English-style riding is a style of horseback riding in which the rider directs the horse by using both hands on the reins. English riders post the trot, which means that they rise and

According to Tavares, Bullett and R. Perl assisted her in mounting Walker. She stated that she is usually able to mount horses herself, but she needed assistance since the horse was tall. Three horses went out with the group that day. R. Perl rode on Hlin, Tavares rode on Walker, and Bullett and Rosen walked on foot with Sedona, a horse that had an injured leg. Tavares testified that she told R. Perl at the beginning of the ride that she did not want to ride down any steep areas. He responded by explaining how to ride her horse in those areas and she told him, "Bob, just let's avoid any rough area that I'm not accustomed to riding." (Tavares dep. at 112).

Tavares testified that she did not tell anyone that she felt uncomfortable riding Walker prior to mounting the horse. About five minutes into the ride she told Bullett, then her husband, and then R. Perl that she felt uncomfortable because the horse would not respond to her commands. Bullett assured her, "[t]his is the sweetest horse. It couldn't hurt a fly. You're going to have the nicest ride of your life." (Tavares dep. at 80).

According to Tavares, the horse suddenly turned 180 degrees without her command and walked in the opposite direction towards Bullett, Rosen, and Sedona. When Tavares and the horse reached Bullett, Rosen, and Sedona, Tavares said to Bullett, "Sylvia, this horse is not responding to my command. I do not want to ride this horse anymore. I want to get off the horse." (Tavares dep. at 87). Bullett reiterated that Walker was the sweetest horse and explained that he came back as he liked to ride with Sedona.

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sit in rhythm with each stride.

Tavares testified that R. Perl saw her horse turn around and then rode back to join her, Bullett, and Rosen. When R. Perl arrived, Tavares explained that she did not want to ride Walker anymore. R. Perl responded, "I know a shortcut. Just follow me." (Tavares dep. at 88). Tavares alleges that before she could respond, R. Perl, "started moving really fast and whooing his dog like a cowboy." (Tavares dep. at 95-96). She subsequently clarified that she meant he made sounds like a cowboy. R. Perl rode off on the trail down the hill and Walker followed. Tavares testified that she held Walker's reins with her right hand and her other hand was on the pommel, and that she did not yell or scream because she did not want to scare Walker.

According to Tavares, R. Perl's shortcut was downhill, woody, rocky and covered in leaves, and she pulled back on Walker's reins, but the horse did not respond. Five seconds after Walker began to run, he stumbled and then started moving faster. Tavares saw Walker was moving into a tree and tried to steer him to the right. Walker would not respond so she tried to steer him left, but he still did not respond and began acting out of control. Tavares stated that she tried to stay atop the horse and that was her last recollection. She does not remember falling off the horse. She believes the whole incident took place in less than thirty seconds and the horse traveled approximately thirty yards.

Tavares testified that when she regained consciousness, she was lying on the ground and her husband was holding her head. R. Perl was walking around the area next to them. Tavares asked R. Perl why he did not come back and help her and he responded that he was having trouble getting his own horse under control.

Tavares testified that when J. Perl came to visit her during her recovery, she was distressed and said her husband never should have put Tavares on Walker. According to Tavares, J. Perl said Walker had thrown her nephew the week before and bitten someone else. After the accident, Tavares learned from R. Perl that Walker was given back to his previous owner. R. Perl also told Tavares that Walker had been returned once or twice due to ill behavior.

At his deposition, Rosen testified that he was concerned from the start about Walker, since he wanted his wife to ride a smaller horse. R. Perl reassured him that all of the horses were gentle and would not hurt anybody. R. Perl told him that Bullett helped pick the horses. Rosen testified that he met Bullett at the Perl's daughter's bat mitzvah, where she told him she was an expert horseman and a certified trainer.

Rosen testified that Bullett put his wife on Walker after determining that she rode Western-style. He stated that his wife was concerned because she did not want to ride on unfamiliar terrain. According to Rosen, Bullett told Tavares, "You'll have no problems. This is the kindest, sweetest, gentlest horse in the world. It wouldn't hurt a fly." (Rosen dep. at 23-24). According to Rosen, after Tavares' horse made a U-turn, he overheard Tavares tell Bullett that she wanted to change horses. He did not intervene as the event happened quickly. Bullett explained to Tavares that Walker turned around because he usually rode with Sedona. Rosen testified that R. Perl joined the group and his wife said to R. Perl, "I don't want to continue." (Rosen dep. at 28). R. Perl responded, "I know a shortcut. Follow me." (Rosen dep. at 28). R. Perl and his horse took off and Walker shot off after them. Rosen clarified that R. Perl's horse started walking and gained speed, as did Walker. He saw Walker stumble and then disappear

over a hill very erratically. He followed after his wife and Walker. Bullett said to him, "You know, I haven't been riding these horses the way I'm supposed to." (Rosen dep. at 33-34). Bullett's statement panicked him, but he did not ask her to clarify since at that point he had already started running ahead.

According to Rosen, R. Perl told him that his wife was against having horses from the start because she was afraid someone would get hurt. Rosen also testified that R. Perl told him that when he called the person he bought Walker from, he was told that the horse had been returned several times due to ill behavior. Rosen asked R. Perl why he let his wife ride Walker, to which R. Perl responded that he was sorry and he was reckless and was going to change his ways.

During his deposition, R. Perl testified that he rode horses for years at camp and transported horses cross-country when his sister had a quarter horse farm in upstate New York. He rode horses on vacation at various places and has a friend who has a horse farm in Colorado where he has also spent time riding.

R. Perl testified that his understanding of Bullett's horse qualifications was that she had several horses of her own and had done a lot of studies on horse training. He discussed her employment history with her, but he never questioned her prior work experience with horses, since she had already worked for him for several years and had proven to be a trustworthy employee. R. Perl testified that he and Bullett jointly located the horses, but he thinks he located Hlin and Bullett located Walker and Sedona. They went together to look at Hlin and Walker before R. Perl purchased the horses and Bullett advised him. The woman who sold Walker told R. Perl that the horse was used for training and with school children. He test rode Walker under adverse conditions and

found the horse to be very responsive. R. Perl testified that he could not recall asking the owner about Walker's history.

R. Perl described an incident that occurred when his five-year-old niece Natalie was riding Walker. Bullett had left R. Perl and his niece with the horse a few minutes earlier. R. Perl was holding Walker and let go for a second to get his bridle, which had been taken off. When he grabbed the bridle, Walker started to walk, so R. Perl tried to grab him. Walker started to trot and Natalie fell off, which R. Perl later clarified as "slipped off." ®. Perl dep. at 40). Walker trotted towards the house, since his ultimate goal was to reach Sedona, to whom he was very attached. R. Perl testified that Walker never nipped, but liked to lick. He also stated that he was aware of an incident in which Walker was scared by a screen door slamming and quickly turned around, which resulted in Bullett falling off the horse.

R. Perl testified that he expected Tavares to ride Sedona because she was the slowest horse, but the horse was too lame to be ridden. He suggested to Bullett that Tavares be put on Hlin, but Bullett decided it would be safer for Tavares to ride Walker, since Tavares would not know how to properly control Hlin and he was the leader. Walker was the most submissive of the horses and Hlin was the toughest. R. Perl testified that he does not recall telling Tavares that Walker was a safe horse, "but [he] could have said that." ®.. Perl dep. at 49). He also does not know if Bullett told Tavares or Rosen that Walker was a safe horse, but he knows that was Bullett's belief of the horse. He recalled that Tavares wanted to ride Hlin, but Bullett explained to her that the arrangement would not work because she did not know how to rein the horse.

According to R. Perl, Tavares told him she had been riding her whole life and that she not only galloped, but also did jumps, which are both advanced techniques. Based upon her history of jumping, R. Perl believed Tavares was a "vastly better rider" than he was, although he never asked her the size or types of horses or circumstances under which she jumped. ®. Perl dep. at 51). He did not recall asking Tavares about her riding style, but he remembered Bullett questioning her for a while about her skills and experience. R. Perl stated, "The general sense was that [Tavares] was quite confident in her abilities. ®. Perl dep. at 52).

R. Perl testified that when the ride began he lead on Hlin, Tavares followed him on Walker, and Bullett and Rosen walked behind on foot with Sedona. He looked behind him at three points. When he saw Walker had turned around to join Bullett, Rosen, and Sedona, he turned his horse around to follow. He overheard Tavares tell Bullett something similar to, "I'm trying to turn him around and he's not listening." ®. Perl dep. at 64). He did not hear Bullett's response, but is certain that she gave Tavares directions. They continued riding and reached a point where the main trail was "a wash out" since leaves had blown from the trees and created a large cushion of leaves on the ground, preventing the horses from seeing the rocks underneath. ®.. Perl dep. at 72). They arrived at a slope, which was steeper than the trail before it. R. Perl stopped and said, "let's sit back here" and then went down the steep slope without incident. ®. Perl dep. at 72). He glanced back to see how Tavares was doing and saw that Walker was nervous and seemed to be slipping. He observed Tavares pulling back on the reins and saw Walker start to trot, which he thought was not a good sign, since horses do not usually like to trot downhill. However, when he saw the horse trotting, he thought Tavares had

good balance. R. Perl continued to ride his horse and when he turned around again, he observed Walked was without a rider. He controlled Hlin and then turned around and saw Tavares lying on the side.

At her deposition, Bullett testified that she grew up in the Catskills riding horses. She received western training from age seven to thirteen and she also took lessons at an English riding academy from age nine to fifteen, where she learned horse training. At the age of thirteen she received her own grade horse, which she rode daily until she went to college.

Bullett testified that she assisted the Perls with purchasing the horses. Walker's owner told Bullett that she had the horse for a long time, she used him to teach children how to canter, and she found him to be a great, kind horse. Bullett testified that she did not ask the owner specific questions about Walker's temperament and past history. Bullett stated that following the accident, no one rode Walker and she believed he was gifted in January 2009.

Prior to the accident, Bullett rode Walker approximately twenty times and she estimated that R. Perl rode the horse about fifteen times, his daughter Hannah rode him about twelve times, and his daughter Ava rode him once. Bullett testified that R. Perl told her about the incident when his niece fell off Walker, but she was not present and she did not witness Walker ever nip or bite anyone. She never discussed Walker's temperament with either of the Perls following the incident with their niece since "Walker was just acting like a horse." (Bullett dep. at 95).

Bullett stated that the morning of the accident Tavares told her that she rode horses on every vacation and recalled a story of galloping on the beach and screaming.

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Bullet asked Tavares about her riding style and Tavares responded that she not know the difference between English and western-style riding, but she said that she held the reins in one hand, so Bullett determined that she rode western-style. Tavares told Bullett that she wanted to ride Hlin, but Bullett told her that she would have to ride Walker as he was trained western-style and Hlin was not. Bullett also testified that Walker was used to novices, unlike Hlin, but she did not tell Tavares that since she did not want to offend her. Bullett showed Tavares how to hold the reins and explained how to neck rein. Bullett testified that she wanted to walk Tavares down to the ring and work with her there, but the group was anxious to go out on the trail, and as an employee she obliged.

According to Bullet, once Tavares mounted Walker, R. Perl led the way on Hlin and Walker followed and was initially well behaved. Subsequently, however, Tavares and R. Perl then rode back towards Bullett and Rosen on their horses. Tavares told Bullett that she was having trouble neck reining her horse and asked to be shown again, and Bullet helped her. R. Perl and Tavares continued on the trail and got ahead of Bullett and Rosen. Rosen received a phone call and Bullett waited with him while he took the call, which was only a couple minutes. Afterwards, Bullett and Rosen continued walking and talking. When they came to the crest of the hill, Bullett saw Tavares lying on the ground and Walker was standing next to R. Perl, who was still mounted on Hlin and staring at Tavares. Bullett explained that Tavares was on the trail, but she had gone on the steeper trail when the trail forked. Bullett testified that after the accident, the Perl family did not ride horses in her presence again.

Bullett testified that she told Tavares that Walker was a gentle horse, although she believes that she made the statement in the car, and not at the stables or during the

ride. She further testified that she did not recognize the area where Tavares was found in the photograph exhibits, since the photographs depict "generic woods" and Tavares was found on a trail. (Bullet dep. at 150).

During her deposition, J. Perl testified that she first learned about the accident one week after it occurred. J. Perl testified that Bullett held herself out as a horse expert and told her that she went to equestrian school, owned her own horses and grew up around horses.

J. Perl testified that she did not have any prior experience with horses and that she had never been on the horse trail. J. Perl stated that she told Tavares about her niece falling off Walker, but explained to her that it was just the horse's herd nature. J. Perl testified that she was not present at the property on the day of the accident, but that her husband told her that Tavares was going down a slope, lost control, and fell off.

J. Perl stated that she did not recall telling Tavares and Rosen that Walker had bit someone, nor that her husband should not have let Tavares ride the horse. She did not remember having any conversations about Walker's history with Tavares or Rosen. She divested herself of Walker because of the accident on her property.

After the accident, plaintiffs commenced this action seeing to recover damages for Tavares' injuries and aid for loss of services on behalf of Rosen. The complaint contains causes of action for negligence against all of the defendants and additional claims against the Perls based on the theory of respondeat superior and their failure to maintain their property in a reasonably safe condition.

Defendants move for summary judgment, arguing that they cannot be held liable to plaintiffs. In particular, they argue that based on the evidence in the record, including

the deposition testimony of R. Perl, Bullett, and J. Perl (1) Tavares assumed the risk of injury from horseback riding, (2) the defendants had no notice of any dangerous or vicious propensities relative to the horse that plaintiff voluntarily elected to ride, and (3) the defendants did not owe plaintiffs a duty.

In opposition, the plaintiffs argue that the defendants ignore evidence that their conduct contributed to Tavares' injuries and of Walker's vicious propensities. Plaintiffs also argue that as landowners, the Perls owed Tavares a duty to maintain their property in a reasonably safe condition.

In support of their opposition, plaintiffs submit the expert affidavit of Drusilla E. Malavase ("Malavase"), who states that she is certified by the American Riding Instructor Association and has over fifty years of experience teaching riding and horse management skills. Based on her interview with plaintiffs and two EMT rescue squad personnel and her review of certain discovery responses and other evidence,[3] Malavase opines that for R. Perl and Bullett, "...to expect [that Tavares], an occasional rider of unknown experience on an unfamiliar horse to be able to navigate [the] terrain [where the accident happened] safely was overly optimistic and reckless." (Malavase Affidavit at 4). She further opines, "...the normal rule on any trail ride is to keep the speed of the ride at the level of the least experienced rider's comfort level." (Id.).

[3] Specifically, Malavase reviewed the verified bill of particulars, the response to combined demands, the Woodstock EMT's Report, a summary of Tavares' Benedictine Hospital admission report, and a Google earth map of 59 Silver Hollow Road, Willow, NY. Additionally, she spoke with the plaintiffs, the lead EMT Mr. Benjamin Holm, and Captain Richard Edelson of the Woodstock Rescue Squad and retraced the trail ride route with the plaintiffs and the lead attorneys.

Malavase further states, "[w]hen one adds the fact that the rider of a lead horse shouts and speeds up, an action warned against in established trail ride etiquette and practice, an additional hazard is supplied." (Id.). She also opines that Bullett's choice to walk an injured horse over rough terrain was concerning and suggests that Bullett should be questioned about whether Walker was "herd bound" and therefore difficult to control without the companion horse. (Id.). Malavase further opines that, "...the actions of Ms. Bullett and Mr. Perl in persuading Ms. Tavares to continue riding Walker, when she was obviously uncomfortable in doing so and the horse was disobeying her commands and acting on his own, and Mr. Perl in shouting and speeding up off the trail in a sloped wooded area with wet covered leaves and rocks, were the cause of the horse Walker's going out of control and throwing Ms. Tavares causing her serious physical injury." (Id. at 5).

In reply, the defendants submit the expert affidavit of Rita Timpanaro ("Timpanaro"), a certified equine appraiser and consultant who has over thirty-five years of experience in the horse industry. Timpanaro, who reviewed the deposition transcripts, opines that Walker did not display any dangerous or vicious propensities either before or after the accident. She finds Walker's behavior was "normal and customary of a domestic animal." (Timpanaro Affidavit at 1). She further opines that, "...the area and trails where the horses were taken [were] entirely appropriate and there is no evidence of any unsafe conditions that would render the horse ride to be dangerous [and] [i]t is common practice, while trail riding, to choose different paths and often to ride the horse off the defined path." (Id. at 1-2). Timpanaro further opines that, "...it is well-known both within and outside the equine community that participation in the sport of horseback

riding engenders an assumption of risk that one may be injured as a result of that activity." (Id. at 2).

Defendants further argue that the expert opinion of Malavase must be disregarded as speculative since she failed to discuss whether the horse had any dangerous or vicious propensities and based her conclusion that the trail was purportedly dangerous for "an occasional rider of unknown experience." In addition, defendants assert that Malavase was taken to the incorrect location of the accident, since Tavares said later at deposition that she was not sure if the route she visited with Malavase was where the accident actually happened. They also argue that Malavase's characterization of Tavares as having "unknown experience" is belied by the record.

Discussion

On a motion for summary judgment it is incumbent upon the moving party to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once the proponent has established this prima facie showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact, which require a trial of the action." Romano v. St. Vincent's Medical Ctr., 178 A.D.2d 467, 470 (2nd Dept. 1991), citing Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980).

Assumption of the Risk

Assumption of the risk is a defense that applies to injuries which are sustained as a result of the known or reasonably foreseeable consequences of participation in a certain

activity. Smith v. Hunting View Farm, 265 A.D.2d 928 (4th Dept. 1999), citing Morgan v. State, 90 N.Y.2d 471, 484 (1997). The defense is based on the proposition that, "by participating in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." Morgan, 90 N.Y.2d at 484. The factors assessed in determining whether a sports participant assumes the risk of injury depend on, "the openness and obviousness of the risks, the participant's skill and experience, as well as his or her conduct under the circumstances and the nature of the defendant's conduct." Rubenstein by Rubenstein v. Woodstock Riding Club, 208 A.D.2d 1160, 1160 (3d Dept. 1994) (citations omitted). While the participant's skill and experience is one factor to assess, "some risks are so perfectly obvious that even a relatively inexperienced participant should be charged with knowledge of them, simply because they "inhere [in the sporting activity] so far as they are obvious and necessary'..." Dalton v. Adirondeck Saddle Tours, Inc., 40 A.D.3d 1169, 1171 (3rd Dept. 2007), citing Morgan, 90 N.Y.2d at 482-483, quoting Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 482-483 (1929).

In sporting activities involving horses, "there is always an inherent risk of being injured by a horse since [horses] are large, strong animals that at times are unpredictable." Rubenstein by Rubenstein, 208 A.D.2d 1160. "The inherent risks of being injured by a horse include [the] scenario, in which a horse, frightened or angry, bolts and bites a person; this is a sudden, unpredictable but commonly-appreciated risk comparable to other inherent risks such as being kicked...being thrown or falling." Tilson v. Russo, 30 A.D.3d 856, 857 (3d Dept. 2006).

At the same time, however, the defense of implied assumption of the risk is limited by the standard that plaintiffs are not considered, "to have assumed the risk of reckless or intentional conduct or concealed or unreasonably increased risks." Morgan, 90 N.Y.2d at 485 (citations omitted). "[I]n assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard should include whether the conditions caused by the defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport.'" Id., quoting Owen v. R.J.S. Safety Equipment, Inc., 79 N.Y.2d 967, 970 (1992). In addition, "[a] showing [of] some negligent act or inaction, referenced to the applicable duty of care owed to [a plaintiff] by [the] defendants, which may be said to constitute 'a substantial cause of the events which produced the injury' is necessary." Id., quoting Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 659 (1989) (citations omitted).

Here, defendants have made a prima facie showing that the assumption of the risk defense applies by providing evidence that Tavares had experience horseback riding and that her injuries were caused by getting thrown from a horse, which is a foreseeable risk of horseback riding. See e.g. Eslin v. County of Suffolk, 18 A.D.3d 698 (2nd Dept. 2005) (summary judgment granted based upon prima facie evidence that the plaintiff assumed the risk of injury, since being thrown from a horse or a horse acting in an unintended manner are dangers inherent in horseback riding).

However, plaintiffs have controverted this showing by producing evidence sufficient to raise a triable issue of fact as to whether R. Perl's reckless or intentional conduct in shouting and speeding off the trail enhanced the risk of foreseeable injury and

was a substantial factor in causing Walker's conduct and the resultant injuries to Tavares. See Millan v. Brown, 295 A.D.2d 409, 410 (2nd Dept. 2002) (holding that while the injured plaintiff assumed the risk of falling off a horse, she did not assume the risk created by the alleged reckless conduct of the defendant in making a loud noise by shaking a vinyl tarp that "spooked" the horse).

Likewise, the record raises triable issues of fact as to whether the failure of Bullett and R. Perl to heed Tavares' requests to stop riding Walker, based on her complaints that she could not control him, unreasonably increased the risk of injury ordinarily associated with horseback riding. In fact, plaintiffs' expert opines that it was not a safe choice to persuade a rider like Tavares, with clearly articulated control issues to continue riding. See Corica v. Rocking Horse Ranch, Inc., 84 A.D.3d 1566 (3rd Dept. 2011) (holding that issue of fact existed as to whether trail guide failure to respond to horse's bucking increased the risk of injury inherent in horse back riding); Lipari v. Babylon Riding Center, Inc., 18 A.D.3d 824 (2d Dept. 2005)(holding that while the plaintiff assumed the risk of being thrown from a frightened horse, he did not assume the heightened risk created by the negligent conduct of the trial guides in leaving him unattended in the rear of a line of horses). Moreover, any lack of clarity as to the location of the accident is insufficient to eliminate triable issues of fact as whether the conduct of defendants increased the risk of plaintiff's injuries.

Next, the law imposes liability upon the owner of a domestic animal who either knew or should have known of that animal's vicious propensities for the harm the animal causes as a result of those propensities. Collier v. Zambito, 1 N.Y.3d 444, 446 (2004). Here, summary judgment is not warranted as issues of fact exist as to whether Walker's

prior behavior when he began trotting and the Perl's niece fell and when he reacted to the door slamming and Bullett fell off constituted dangerous propensities of which defendants knew or should have known. See e.g. Haggerty v. Zelnick, 68 A.D.3d 721 (2nd Dept. 2009)(issue of fact existed as to whether defendant's knew or should have known of horse's vicious propensity to rear and kick); Deak v. Bach Farms, LLC, 34 A.D.3d 1212 (4th Dept. 2006)(finding that although the plaintiff had experience caring for horses, he did not assume the risk of injury, since he had limited riding experience and the defendants allegedly knew about the horse's dangerous proclivities, which were not made known to the plaintiff until after his injury occurred).

Moreover, Tindall v. Ellenberg, 281 A.D.2d 225 (1st Dept. 2001) and Kinera v. Jam. Bay Riding Academy, Inc., 11 A.D.3d 588 (2nd Dept. 2004), on which defendants rely, do not require a different result. In both of these cases, the record showed that the plaintiff was made aware of the relevant horse's propensities and voluntarily assumed the risk of injury. In contrast, here, Tavares neither observed, nor was informed of Walker's allegedly dangerous propensities. Furthermore, the opinion of Timpanaro that Walker's behavior was normal and customary of a domestic animal and that he did not display any dangerous or vicious propensities either before or after the accident is insufficient to eliminate triable issues of fact, in light of evidence of Walker's erratic behavior.

In sum, given the circumstances here, including evidence regarding Walker's behavior, defendants' conduct in ignoring Tavares statement that she was not comfortable riding Walker, and R. Perl's conduct which arguably increased Tavares's risk of injury, summary judgment is not appropriately granted in defendants' favor.

Finally, it cannot be said as a matter of law that defendants did not owe a duty to Tavares under the circumstances here. See generally, Basso v. Miller, 40 N.Y.2d 233, 241 (1976).

Conclusion

In view of the above, it is

ORDERED that the defendants' motion for summary judgment is denied; and it is further

ORDERED that a pre-trial conference will be held in Part 11, room 351, 60 Centre St., New York, NY on January 26, 2012 at 2:00 pm.

DATED January 17, 2012

J.S.C.