[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 101146/2007
FLEMMIG, MARK
vs.
KWAK, COLLIN
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, **were read on this motion to/for** _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits and cross motion **No(s).** _____

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

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

FILED
OCT 23 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 9, 2013

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 11

MARK FLEMMIG,

Plaintiff,

- against -

COLLIN KWAK, ROSE ASSOCIATES, and CHELSEA NEW YORK REALTY LLC,

Defendants.

Index No.: 101146/07

DECISION/ORDER

MADDEN, JOAN A., J.:

In this action, plaintiff Mark Flemmig (Flemmig) sues to recover for injuries sustained when he was bitten by a dog owned by defendant Collin Kwak (Kwak). Defendants Chelsea New York Realty LLC (Chelsea) and Rose Associates (Rose), the owner and manager, respectively, of the building where the incident occurred, move for summary judgment dismissing the complaint. Kwak cross-moves for the same relief.

Background

The material facts of this matter are largely undisputed. In August 2006, Kwak resided in Apartment 7E at 55 West 26th Street, New York, New York, a residential building (the Capital), owned by Chelsea and managed by Rose. Kwak Dep., Ex. E to Walthall Aff. in Support of Motion of Defendants Rose and Chelsea (Walthall Aff.), at 6; Felicetti Dep., Ex. D to Walthall Aff., at 6-7. At that time, Kwak owned an American Staffordshire terrier, also known as a pit bull, named Jesus (the dog). Kwak Dep., at 15. Flemmig, who then worked at a restaurant in the area, became

friendly with Perry Wexler (Wexler), a woman who lived in the Capital, and he occasionally visited her there. Flemmig Dep., Ex. F to Walthall Aff. (Pl. 2008 Dep.), at 12-13; Flemmig Dep., Ex. G to Walthall Aff. (Pl. 2009 Dep.), at 20.

On or about the evening of August 16, 2006, Flemmig was with Wexler and a couple other acquaintances in her apartment, when Kwak, who also knew Wexler, invited them to his apartment for an impromptu get together, which included, according to Kwak, at most seven or eight people in the apartment at any point during the evening. Pl. 2008 Dep. at 18, 23; Kwak Dep. at 39-40. Flemmig testified that, some time after he arrived at Kwak's apartment, he learned that Kwak had a dog, after someone opened the bedroom door and Kwak, quickly closing it, told the guest to keep the door closed because there was a dog there. Pl. 2009 Dep. at 37. Kwak testified that he usually put his dog in the bedroom when people he did not know came to his apartment for a party because his dog, while "very loving of people he knew," was "apprehensive of strangers." Kwak Dep. at 17, 65.

After a few hours at Kwak's apartment, Flemmig left to accompany Wexler back to her apartment, but returned about 10-15 minutes later. Pl. 2008 Dep. at 28-29; Pl. 2009 Dep. at 42-43. The dog had been let out of the bedroom by Kwak because most of the people had left. Kwak Dep. at 17. Although there is some dispute about what happened after Flemmig returned and where he

was in the apartment just before he was bitten (*see* Pl. 2008 Dep. at 31, 35-37; Kwak Dep. at 29, 46-48, 49-51), it is not disputed that, shortly after Flemmig returned to Kwak's apartment, the dog jumped on Flemmig and bit him in the neck, causing injuries. Pl. 2008 Dep. at 38-39; Kwak Dep. at 29, 49-50. Flemmig was bleeding, and Kwak accompanied him in a taxi to St. Vincent's Hospital emergency room, where plaintiff was treated and released. Pl. 2008 Dep. at 52-53; Pl. 2009 Dep. at 65-66; Kwak Dep. at 29, 30-31, 32-33. Flemmig testified that he has scars on his neck and numbness in the area of the scars, that sometimes the scars rip open when he shaves, and that he now is "deathly nervous around larger dogs," particularly pit bulls, and will cross the street whenever he sees one. Pl. 2008 Dep. at 56; Pl. 2009 Dep. at 75-77, 78.

Mary Felicetti (Felicetti), employed by Rose as the general manager of the Capital (Felicetti Dep. at 6), testified that she first was notified about the dog bite incident when she was served with the complaint in this action, on or about September 8, 2006, and she then called Kwak to find out what happened. *Id.* at 36-37, 39. She also testified that the Capital has always allowed pets and that Kwak was permitted to have the dog in his apartment. *Id.* at 17, 19. She further testified that she received no complaints about the dog except on one occasion, following a weekend earlier in 2006, when two or three units left

her messages complaining that the dog had been barking over the weekend. *Id.* at 25-26. She then sent a letter to Kwak about the complaints, and he responded to her, apologizing and asserting that it would not happen again. *Id.* at 26-27. Following the barking complaint, neither she nor Chelsea ever received any other complaints about the dog. *Id.* at 28-29, 73.

Kwak testified that there was a prior incident involving his dog, which occurred in the lobby of the building, when the dog lurched at another building resident who was bending down to greet the dog. Kwak Dep. at 19. Kwak first described the incident as an attempt to bite, but then testified that there was no bite, that the "two bumped into each other," and he did not believe there was a bite. *Id.* Kwak also testified that one of the building's doormen, Jose Carrasquillo (Carrasquillo), was present at the time that this incident took place, and that he later had a conversation with Carrasquillo about it and about reaching the other tenant involved. *Id.* at 18, 23. Carrasquillo attests, however, in an affidavit submitted in support of defendants' motion, that he did not witness this incident. Carrasquillo Aff., Ex. I to Walthall Aff., ¶ 9. He also attests that he saw the dog on a daily basis, the dog was "calm and friendly" and "never displayed any type of negative behavior" *(id.*, ¶¶ 5, 10), and he knew of no complaints about or other incidents involving Kwak's dog prior to August 2006. *Id.*, ¶¶ 6,

8. Kwak also testified that, other than the complaint about barking, he received no complaints about his dog's behavior. Kwak Dep. at 38.

Discussion

It is well settled that to prevail on a motion for summary judgment, the moving party must establish the cause of action or defense, by submitting evidentiary proof in admissible form, "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such showing has been made, to defeat summary judgment, the opposing party must show, also by producing evidentiary proof in admissible form, that genuine material issues of fact exist which require a trial of the action. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman*, 49 NY2d at 562. The evidence must be viewed in a light most favorable to the nonmoving party (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]), and the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). However, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a material question of fact. *Zuckerman*,

49 NY2d at 562.

At the outset, the court rejects plaintiff's argument that the motion and cross motion should be denied based on procedural defects. Contrary to plaintiff's contention, "[t]he fact that defendant[s'] supporting proof was placed before the court by way of an attorney's affidavit annexing plaintiff's deposition testimony and other proof, rather than affidavits of fact on personal knowledge, does not defeat defendant[s'] right to summary judgment." *Olan v Farrell Lines, Inc.*, 64 NY2d 1092, 1093 (1985); *see Alvarez*, 68 NY2d at 325.

Further, while plaintiff is correct that, pursuant to CPLR 3212 (b), a complete set of the pleadings should have been annexed to the moving papers, "the court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete.' The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted." *Washington Realty Owners, LLC v 260 Washington St., LLC*, 105 AD3d 675, 675 (1st Dept 2013) (internal citations omitted); *see Pandian v New York Health and Hospitals Corp.*, 54 AD3d 590, 591 (1st Dept 2008) (the pleadings were attached to the reply papers); *Welch v Hauck*, 18 AD3d 1096, 1098 (3rd Dept 2005) (summary judgment properly granted to plaintiff on cross motion where pleadings were

attached to defendant's motion for summary judgment). Here, defendant Kwak's answer was not included with the moving papers, but was submitted with the cross motion, and also in reply. The court, therefore, has a complete set of the pleadings.

In addition, the unsigned but certified deposition transcripts submitted by defendants, the accuracy of which plaintiff did not dispute, are admissible. *See Ortiz v Lynch*, 105 AD3d 584, 585 (1st Dept 2013); *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 (1st Dept 2013); *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 (2nd Dept 2012); *Bennett v Berger*, 283 AD2d 374, 375 (1st Dept 2001). As to plaintiff's objection to Carrasquillo's affidavit and claim that he was only identified after the note of issue was filed, Rose and Chelsea submit proof that he was identified prior to the filing of the note of issue. Finally, the motion itself is timely, as it was made before the note of issue was filed.

Liability for Injury Caused by Dog

As courts now have made clear, "'New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal.'" *Doerr v Goldsmith*, 105 AD3d 534, 534 (1st Dept 2013), quoting *Egan v Horn*, 74 AD3d 1133, 1134 (2nd Dept 2010); *see Petrone v Fernandez*, 12 NY3d 546, 550 (2009); *Bard v Jahnke*, 6 NY3d 592, 599 (2006). Rather, it has long been the rule that "the owner of a domestic animal who

either knows or should have known of that animal's vicious propensities will be held [strictly] liable for the harm the animal causes as a result of those propensities." *Collier v Zambito*, 1 NY3d 444, 446 (2004) (internal citations omitted); *see Petrone*, 12 NY3d at 550; *Bernstein v Penny Whistle Toys, Inc.*, 10 NY3d 787, 788 (2008); *Bard*, 6 NY3d at 596. Similarly, to recover against a landlord for injuries caused by a tenant's dog, a plaintiff must prove that the landlord knew that the dog was being kept on the premises and knew or should have known that the dog had vicious propensities. *See Strunk v Zoltanski*, 62 NY2d 572, 575 (1984); *Ortiz v New York City Hous. Auth.*, 105 AD3d 652, 652 (1st Dept 2013); *Christian v Petco Animal Supplies Stores, Inc.*, 54 AD3d 707, 707-708 (2nd Dept 2008); *Carter v Metro N. Assocs.*, 255 AD2d 251, 251 (1st Dept 1998).

"Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others in a given situation." *Collier*, 1 NY3d at 446 (internal quotation marks and citations omitted); *see Bard*, 6 NY3d at 596-597; *Palumbo v Nikirk*, 59 AD3d 691, 691 (2nd Dept 2009). Knowledge of vicious propensities may be established by proof of a prior bite or attack or other "acts of a similar kind of which the owner had notice" (*Collier*, 1 NY3d at 446), but, even in the absence of a prior bite or attack, proof of "something less" (*Bard*, 6 NY3d at 597), for example, "evidence that the dog 'had

been known to growl, snap or bare its teeth' might be enough to raise a question of fact, depending on the circumstances." *Brooks v Parshall*, 25 AD3d 853, 853-854 (3rd Dept 2006), quoting *Collier*, 1 NY3d at 447; *see Bard*, 6 NY3d at 597; *Illian v Butler*, 66 AD3d 1312, 1313 (3rd Dept 2009); *Morse v Colombo*, 8 AD3d 808, 809 (3rd Dept 2004).

"In addition, an animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities--albeit only when such proclivity results in the injury giving rise to the lawsuit." *Collier*, 1 NY3d at 447; *Bard*, 6 NY3d at 597. "'Such behaviors can include the animal being territorial, aggressively barking when [his or] her area [is] invaded, attacking another animal, growling and biting at another dog' and jumping on individuals." *Grillo v Williams*, 71 AD3d 1480, 1481 (4th Dept 2010), quoting *Morse*, 8 AD3d at 809; *see Seybolt v Wheeler*, 42 AD3d 643, 645 (3rd Dept 2007) (dog backed neighbor into garage and barked & went into neighbor's back yard and growled at him); *Calabro v Bennett*, 291 AD2d 616 (3rd Dept 2002) (dog aggressively barked when area invaded, frequently jumped on people, attacked another animal); *Lagoda v Dorr*, 28 AD2d 208, 209 (3rd Dept 1967) (dog repeatedly broke away from chain, was trained and used as watchdog, jumped on people,

previously chased plaintiff bicyclist); *but see Blackstone v Hayward*, 304 A.D.2d 941 [2003]) (dog chasing bicyclists and vehicles, barking at strangers, fighting with another dog not enough to show vicious propensities); *see generally Kachenkov v Vadala*, 2013 WL 1930264, *2, 2013 NY Misc LEXIS 1897, *1, 2013 NY Slip Op 30971(U) (Sup Ct, Queens County 2013) (factors to consider); *Gervais v Laino*, 2013 WL 1808100, *2, 2013 NY Misc LEXIS 1708, *3, 2013 NY Slip Op 30841(U) (Sup Ct, NY County 2013) (same).

However, "normal canine behavior," such as running around and barking, generally is insufficient to show vicious propensities. *Collier*, 1 NY3d at 447; *see Petrone*, 12 NY3d at 549 (running at mail carrier but not biting or threatening was not vicious conduct); *Bloom v Van Lenten*, 106 AD3d 1319, 1321 (3rd Dept 2013) (dog running into plaintiff while playing with other dogs is normal canine behavior and does not amount to vicious propensity); *Hamlin v Sullivan*, 93 AD3d 1013 (3rd Dept 2012)("rambunctious behavior" in park was typical canine behavior and evidence that dog jumped on people to "greet" them not enough to show vicious propensities and not the behavior that resulted in plaintiff's injury); *Campo v Holland*, 32 AD3d 630, 631 (3rd Dept 2006) (barking at strangers and chasing small animals is nothing more than normal canine behavior); *Fontanas v Wilson*, 300 AD2d 808, 809 (3rd Dept 2002) (jumping on mail carrier, tearing

coat but not growling or biting, and barking when strangers approached house insufficient to show vicious propensities); *compare Dykeman v Heht*, 52 AD3d 767, 769 (2nd Dept 2008) (two prior incidents of dog growling, barking, snarling and baring its teeth at plaintiff "exceeds normal canine behavior").

Further, courts have repeatedly held that "'the particular type or breed of domestic animal alone is insufficient to raise a question of fact as to vicious propensities.'" *Bard*, 6 NY3d at 596, *affg Bard*, 16 AD3d 896, 897 (3rd Dept 2005); *see Ortiz*, 105 AD3d at 657 ("vicious propensities may not be inferred solely from the fact that the dog was of the pit bull breed"); *Miletich v Kopp*, 70 AD3d 1095, 1095 (3rd Dept 2010); *Malpezzi v Ryan*, 28 AD3d 1036, 1038 (3rd Dept 2006); *Carter*, 255 AD2d at 251-252.

Additionally, while some courts have found that "proof that an owner restrained the dog and the manner of restraint may be relevant" (*Brooks*, at 853-854; *see Collier*, 1 NY3d at 447; *Miletich*, 70 AD3d at 1095), "nothing in our case law suggests that the mere fact that a dog was kept enclosed or chained . . . is sufficient to raise a triable issue of fact as to whether it had vicious propensities." *Collier*, 1 NY3d at 447; *see Malpezzi*, 28 AD3d at 1038; *Hagadorn-Garmely v Jones*, 295 AD2d 801, 801 (3rd Dept 2002); *Sers v Manasia*, 280 AD2d 539, 540 (2nd Dept 2001).

In this case, there is no evidence of any prior incidents of biting, growling, snapping or baring of teeth. There also is no

evidence that there were any prior complaints to defendants about the dog's behavior, other than the one episode of barking. *See Vitrella v Rodrigues*, 11 AD3d 287, 287 (1st Dept 2004) (frequent barking was not evidence of vicious propensities). The "single minor situation" (*Brooks*, 25 AD3d at 854) involving the dog lurching at another tenant, without growling, snapping or baring its teeth, is insufficient to raise a triable issue of fact as to vicious propensities. *See Uvanni v Crumb*, 92 AD3d 1263, 1264 (4th Dept 2012) (evidence that dog previously escaped from yard, "barked like a dog protecting his home" and "circle[d]" another person and her dogs on at least one occasion does not raise an issue of fact regarding vicious propensities that caused the injury); *Brooks*, 25 AD3d at 854 (dog growling and baring teeth at one guest at party at defendants' home insufficient to raise triable issue as to vicious propensities); *Blackstone*, 304 AD2d at 941 (chasing bikes and vehicles, barking at strangers, fighting with another dog "insufficient to elevate typical territorial behavior into a vicious propensity"); *Roupp v Conrad*, 287 AD2d 937 (3rd Dept 2001) (evidence that dog jumped on fence and growled at passers-by does not show vicious propensities); *Prince v Fried*, 194 AD 282 (1st Dept 1920) (snapping twice at plaintiff's mother does not show vicious propensities).

Evidence that Kwak kept the dog in his bedroom when strangers were in his apartment also does not raise an issue of

fact about vicious propensities, as there is no evidence that this was done because of any prior incidents. *See Orozco v 725 S. Blvd., LLC*, 82 AD3d 480, 480 (1st Dept 2011); *Roche v Bryant*, 81 AD3d 707, 708 (2nd Dept 2011); *Spinosa v Beck*, 77 AD3d 1426, 1427 (4th Dept 2010); *Sers*, 280 AD2d at 540; *Gaffney v Kennedy*, 2003 WL 22149640, *9, 2003 NY Misc LEXIS 1185, *7, 2003 NY Slip Op 51267(U) (Nassau Dist Ct 2003). Nor does the fact that Kwak had his dog put to sleep raise a triable issue of fact; whatever the reason for his decision to do that, such evidence of subsequent remedial measures is not admissible to demonstrate liability. *See Del Vecchio v Danielle Assoc., LLC*, 94 AD3d 941, 942 (2nd Dept 2013); *Purcell v York Bldg. Maintenance Corp.*, 57 AD3d 210, 211 (1st Dept 2011); *Lodico v Ingrassia*, 2010 WL 5579743, 2010 NY Misc LEXIS, *14, 2010 NY Slip Op 33634(U) (Sup Ct, Nassau County 2010).

The court thus finds that defendants have met their prima facie burden of demonstrating their entitlement to summary judgment, and, in opposition, plaintiff has failed to produce proof in evidentiary form sufficient to raise a triable issue of fact. There is no deposition testimony, by any of the witnesses who testified in connection with this case, that Kwak's dog had known vicious propensities. To the extent that plaintiff testified that he had heard comments from other people about prior incidents involving the dog, he offers no evidence, in any

form, to substantiate such testimony. *See Roupp*, 287 AD2d at 939 ("proffer of speculation and hearsay" failed to meet burden); *Basile v Salka*, 2012 WL 368248, 2012 NY Misc LEXIS 395, *5, 2012 NY Slip Op 30240(U) (Sup Ct, Nassau County 2012).

Accordingly, it is

ORDERED that the motion of defendants Rose Associates and Chelsea New York Realty, LLC, and the cross motion of defendant Collin Kwak, are granted and the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: October 9, 2013

JOAN A. MADDEN, J.S.C.