

Lucas v Platt
2018 NY Slip Op 31719(U)
July 20, 2018
Supreme Court, New York County
Docket Number: 155340/2015
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

MELVIN LUCAS,

INDEX NO. 155340/2015

Plaintiff,

MOTION DATE 4/30/18

- v -

MOTION SEQ. NO. 001

CARLA PLATT,

DECISION AND ORDER

Defendant.

NYSCEF Doc Nos. 24-42 were read on this motion for summary judgment.

Motion by Defendant Carla Platt ("Platt") pursuant to CPLR 3212 for summary judgment in favor of Defendant and against Plaintiff Melvin Lucas ("Lucas") on Plaintiff's amended verified complaint is granted in part and denied in part.

BACKGROUND

Lucas commenced the instant action on May 28, 2015, by e-filing a summons and verified complaint, which were supplemented and amended on February 6, 2016. (NYSCEF Doc No. 8 [Complaint].) The Complaint alleges two causes of action, sounding in negligence and strict liability, respectively, for injuries arising out of an incident on October 4, 2014, when Lucas was attacked by a dog owned, maintained, controlled, and/or supervised by Platt. The Complaint alleges that Lucas was walking on the sidewalk near 128th Street and Saint Nicholas Avenue, New York, New York and that Platt or a member of her household was walking the dog when the dog attacked Lucas. The Complaint further alleges, in sum and substance, that, prior to the October 4, 2014 incident, the dog had vicious propensities about which Platt either knew or should have known.

Platt interposed a verified answer to the Complaint on February 16, 2016. (NYSCEF Doc No. 9 [Answer].) The Answer contains a general denial of all the allegations in the Complaint except for paragraphs two and three, which alleged, respectively, that Platt was and still is a resident of New York County and that Platt owned a "certain dog," that being the dog referred to throughout the Complaint. (*Id.*)

Thereafter, the parties commenced discovery in the action. Initially, the matter was assigned to the Hon. Justice Hagler, who conferenced the case on February 29, 2016, and July 18, 2016. On August 19, 2016, per a directive of the administrative judge, the matter was reassigned to this Court, which conferenced the case on November 14, 2016, January 9, 2017, and April 24, 2017. On June 5, 2017, Plaintiff filed the note of issue. On July 11, 2017, the Court

held a further, post-note of issue conference in the matter, where the Court directed, among other things, that the deposition of non-party witness Wendy Murray was to be held on or before July 17, 2017.

On July 25, 2017, Defendant filed the instant motion pursuant to CPLR 3212 for summary judgment in favor of Platt and against Lucas on the Complaint.

Defendant's Submissions in Support of Platt's Motion for Summary Judgment

Defendant argues in support of her motion for summary judgment that she has shown prima facie entitlement to judgment as a matter of law by demonstrating that she had no knowledge or notice of Taurus's alleged vicious propensities. Defendant further argues that Taurus had never bitten anyone, nor had he ever growled, snarled, or lunged at any person or animal, nor had he otherwise displayed any other vicious propensity prior to the October 4, 2014 incident. Defendant also argues that Plaintiff's cause of action sounding in negligence for Taurus's attack on him must be dismissed because New York does not permit recovery in negligence for injuries resulting from a dog bite.

Deposition of Plaintiff, Melvin Lucas

Platt submits four deposition transcripts in support of her motion. Exhibit B to Platt's moving papers is the transcript of Lucas's examination before trial ("EBT"), which was held on June 6, 2016. (Spellman affirmation, exhibit B [Lucas EBT].) Lucas stated at his EBT that, on October 4, 2014, he was attacked by a dog he identified as a "pit bull" belonging to Platt, whom he did not know personally prior to the attack. (Lucas EBT at 61, line 23.) Lucas also stated that he had never seen the dog that attacked him before the incident.

Lucas stated that he had been walking with his friend of over 20 years, Maurice Graham, on the sidewalk on Convent Avenue, near 127th Street and Saint Nicholas Avenue, by Saint Nicholas Terrace. Lucas further stated that he had been at a cookout in a nearby park and had left about ten minutes prior, to walk to meet up with his eldest daughter in the area, when he first saw the dog that would bite him. Lucas estimated that he was "[a] couple of steps. A couple of feet" away from the dog when he first saw it. (*Id.* at 67, lines 18–19.)

Lucas stated that he observed that the dog was black and brown-colored, came up a little bit past his knees when standing normally on all fours, and stood about four to five feet tall when up on its hind legs. Lucas further stated that he observed that the dog was on a leash being held by a young woman, about 17 years old, who was standing still and talking on her cellphone. Lucas further stated that there was no one between him and the young woman, but that there were groups of people nearby, in and around the park and attending the cookout. Lucas described the leash as looking like it was made of "a cloth that was ripped" (*id.* at 84, line 16), as "[v]ery rickety looking, torn . . . and damaged" (*id.* at 70, lines 10–12), and as attached to a collar that "was made out of like – like a cloth. . . . [that] wasn't a leather collar (*id.* at 84, lines 22–25).

When asked to explain, “[c]hronologically, what happened?”, Lucas stated, “I was walking down the street and the dog was – the dog was barking viciously, but before I even got down the street, halfway down the street, the dog was barking and on two legs up, on [hind] legs lurching off the leash.” (*Id.* at 70, line 25; at 71, lines 2–8.) Lucas further stated that the dog was barking and its “teeth were showing” before it attacked, while on its hind legs. (*Id.* at 155, line 10.)

Lucas stated that, as he and Mr. Graham were walking past the young woman holding the leash, the dog “lurched . . . [t]he leash snapped, snapped right off, . . . [and] I turned around and [the dog] was after me, for no reason.” (*Id.* at 71, lines 15–24.) Lucas stated that the dog was “unprovoked.” (*Id.* at 71, line 22.) Lucas then stated,

“I turned around and I was – I was in – I was in a – in a disarray of trying to move and dodge and it went straight for my leg. It went straight for my legs, legs. And it – it grasped my left leg. It caught my left leg. It bit and I felt it sink down and lock jaw on my leg.”

(*Id.* at 72, lines 2–10.) Lucas further stated that the dog bit him “[o]nce and locked . . . and shaken.” (*Id.* at 86, lines 11–14.) When asked if there came a point when he fell from his feet, Lucas replied, “Yes.” (*Id.* at 86, lines 15–17.) When subsequently asked, “[d]id there come a point when the dog was released from your leg?”, Lucas replied, “I don’t remember the dog releasing. I know he was locked on and I had to climb up on an SUV to get the dog off of me. I don’t know how he got off of me. I was doing my best to climb up, because all I thought was to go up.” (*Id.* at 86, lines 18–25.) Lucas stated that the dog bit him on the lower extremity of his left calf, about two centimeters from his left Achilles tendon, and that “[t]he size of the bite is about the size of a hockey p[u]ck.” (*Id.* at 93, lines 6–7.) Lucas further stated that he believed the dog bit his fingers and that he was bleeding from his left elbow and kneecap.

Lucas stated that he told Mr. Graham to take his cellphone and call 911. Lucas further stated that, at that point, Defendant Platt appeared. Lucas stated that he observed that Platt had a bowl of peroxide and was moving her lips as if to say the word “sorry” but was not vocalizing it. (*Id.* at 88, lines 11–24.) Lucas further stated that the ensuing wound required 6-8 hours of surgery, performed immediately after the attack. Lucas then stated that the attack has left him with no feeling in the top of his left foot, which his doctor said could be due to a severed nerve.

When asked who, other than the young woman and Mr. Graham, witnessed the attack, Lucas stated that there were several people who saw it. When asked for their names, Lucas replied, “Wendy. She walks dogs in the neighborhood. She’s very familiar of who has dogs in the neighborhood. And the dogs that she has are Rottweiler[s].” (*Id.* at 79, lines 11–14.) Lucas further stated that he believes Wendy has four Rottweilers.

Lucas stated that he knows Wendy from the neighborhood. Lucas then said that Wendy “heard about the incident” and told Lucas, “I know what happened to you.” (*Id.* at 79, line 19; at 80, line 2.) When then asked if he knew whether Wendy saw Lucas get attacked, Lucas answered, “I don’t know” and further stated that he did not know where Wendy was at the time

of the attack. (*Id.* at 80, lines 10–16.)

Lucas stated that Wendy approached him after the attack, when Lucas was on crutches, and said that she had heard what happened to him. Specifically, Lucas stated that Wendy said, “I heard what happened to you, man. That’s not good. That’s not right. That dog has attacked several people in this neighborhood already.” (*Id.* at 81, lines 15–20.) Lucas then stated that Wendy told him that someone named Brandon had been attacked by the dog previously. Lucas further stated that Wendy said, “I am the most severe out of that dog, that dog is vicious.” (*Id.* at 99, lines 10–11.) Lucas further stated that Wendy said that the dog attacked Brandon and “bit him several times.” (*Id.* at 100, line 18.) When asked, “[d]id Wendy tell you how she knew that?”, Lucas answered, “[i]t was seen. . . . She saw that. She saw the dog attack Brandon, with me being the most severe. I’m the third person, the most severe” (*Id.* at 100, line 25; at 101, lines 2–8.) Lucas also stated that he first learned who Platt was from Wendy after speaking with Wendy approximately one week after the incident. (*Id.* at 89, lines 4–25; at 90, line 2.)

Deposition of Defendant, Carla Platt

Exhibit E to Platt’s moving papers is the transcript of Platt’s EBT, which was held on August 16, 2016. (Spellman affirmation, exhibit E [Platt EBT].) Platt stated that, in October 2014, she lived at 10 Saint Nicholas Terrace in an apartment with her five children, aged 23, 20, 19, 14, and 7. Platt further stated that, at that time, there were two dogs living in her apartment: Brownie, a dog she owned; and Taurus¹, the dog that attacked Lucas. Platt further stated that her daughter, Yasmin Abdus, obtained Taurus when, about five months prior to the October 4, 2014 incident, someone whom she didn’t know handed him to her. Platt further stated that Ms. Abdus was keeping Taurus in Platt’s home, with Platt’s permission, until she could find him a new, permanent home. Platt described the dog as a medium-sized pit bull.

When asked, “[p]rior to October 4, 2014, can you describe [Taurus’s] general disposition towards people?”, Platt responded, “I wouldn’t be able to answer that completely. I can only tell you about the people that were around him. I don’t know about anyone else. Taurus was a very sweet dog. He was very gentle around small children. To my knowledge, he was a good dog.” (Platt EBT at 12, lines 7–15.) Platt stated, in sum and substance, that she never observed Taurus behaving violently or aggressively—no lunging, growling, baring of teeth, biting, snapping, barking, or pulling or straining against the leash, or moving toward a person or animal—nor was she aware of any such behavior prior to the October 4, 2014 incident. Platt further stated that she would not put Taurus in another room when visitors came over.

When asked how she became aware of the October 4, 2014 incident involving Taurus and Lucas, Platt answered, “I heard the commotion downstairs in a matter of seconds from the time [Ms. Abdus] left the apartment, the building, and I ran downstairs. . . . I heard growling, I heard Yasmin yell.” (*Id.* at 18, lines 16–24.) Platt stated that she then went outside. When asked if she had ever heard Taurus make the growling noise that she heard before, Platt answered, “[n]o.” (*Id.*

¹ In Latin, “the bull.” (Charlton T. Lewis, Charles Short, *A Latin Dictionary*, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dtaurus> [last accessed July 14, 2018].)

at 19, lines 5–15.) Platt then stated that she saw Lucas on top of her car with Taurus biting his leg and with Ms. Abdus trying to pull Taurus off the leg. When asked, “[w]hat efforts were made to get the dog off Mr. Lucas?”, Platt replied, “[w]ell, they somehow got him off. He ran to the street and I grabbed him[] [and] took him into the house.” (*Id.* at 20, lines 16–20.) Platt then stated that she told the shelter she did not want the dog returned to her after the incident.

Deposition of Non-Party Witness Yasmin Abdus, Daughter of Defendant

Exhibit C to Platt’s moving papers is the transcript of Ms. Abdus’s EBT, which was held on January 26, 2017. (Spellman affirmation, exhibit C [Abdus EBT].) Ms. Abdus stated that she is Platt’s daughter and lived with her, her four siblings, and their two cats and dogs as of the date of the incident, October 4, 2014. Ms. Abdus further stated that the family obtained Taurus between the end of May and the beginning of June 2014 when, as Ms. Abdus was walking from Central Park one day, she was stopped by a woman she had never met before who asked Ms. Abdus to take the dog. Ms. Abdus further stated that she “didn’t ask a lot of questions” of the woman and “was just happy to get a dog.” (Abdus EBT at 15, lines 6–7.)

Ms. Abdus stated that she saw and heard Taurus growl on one occasion, on the day she got him. When asked to describe what she observed that day, Ms. Abdus responded, “I got him and I came to my neighborhood and I was showing the people the dog. And it was like a lot of people. And he just came behind me just growled, but that was it.” (*Id.* at 22, lines 2–6.) Ms. Abdus stated that the people were bothering Taurus and that the entire episode lasted for less than a minute. Ms. Abdus further described Taurus as “scared” at the time. (*Id.* at 22, line 13.) When asked whether Taurus showed his teeth at the time, Ms. Abdus answered, “[n]o” and confirmed that Taurus’s mouth was closed when he was growling. (*Id.* at 22, lines 14–17.) Ms. Abdus then stated that Taurus was on a leash that day, but was not pulling against the leash—rather, Taurus stood behind her and sat down between her legs.

Ms. Abdus stated that, prior to the October 4, 2014 incident, she never observed Taurus lunge at, run after, or bite a person or animal, nor did she observe Taurus growl at another dog. Ms. Abdus further stated that, prior to the October 4, 2014 incident, Taurus never strained or pulled against his leash. Ms. Abdus stated that Taurus was “super friendly with other animals. Cats, dogs” and “never had an issue with other animals.” (*Id.* at 26, lines 23–24; at 27, line 7.)

Ms. Abdus stated that she did not know Lucas prior to the October 4, 2014 incident. Regarding the incident, Ms. Abdus stated that the leash she had Taurus on was new—a day old—from Petco, was “[v]ery, very limited[] [and] [s]hort] in length, and did not break. In sum and substance, Ms. Abdus stated that she did not remember what happened leading up to the incident, what caused it, or whether Taurus pulled the leash out of her hand. Ms. Abdus further stated that, after the attack commenced, she remembered trying to get Taurus off Lucas. Ms. Abdus stated that there was a lot going on at the time, that she did not remember much, but that Lucas was hitting Ms. Abdus with a closed fist during the incident.

Ms. Abdus stated that, sometime after Taurus was off Lucas, Lucas jumped onto the hood of Platt’s truck. Ms. Abdus then stated that she brought Taurus upstairs to her apartment and,

about ten minutes later, went back outside with Taurus to give him up to the police. Ms. Abdus further stated that, two days later, she heard Platt say over the phone to someone that the family did not want to reclaim Taurus and “[t]hat [Platt] couldn’t take him back.” (*Id.* at 44, line 17.)

Deposition of Non-Party Witness Marcus Graham, Friend of Plaintiff

Exhibit D to Platt’s moving papers is the transcript of Mr. Graham’s EBT, which was held on January 26, 2017. (Spellman affirmation, exhibit D [Graham EBT].) Mr. Graham stated that he has probably known Lucas for about 30 years from around the neighborhood. Mr. Graham further stated that he was walking home with Lucas from a cookout when the incident occurred. When asked to describe what happened to Lucas on October 4, 2014, Mr. Graham said,

“While we were leaving the park, we were coming down a hill. I observed a young lady coming out of her building with a dog, phone in hand. She had the leash in the other hand. The dog was, maybe – like, how the leash is long, the dog is in front of her. About 30 seconds later, the dog got away from her and went after [Lucas] the first time. He got away. He jumped on top of a car. After that, the dog grabbed him by his leg. I started hitting the dog on the side, trying to get him off. He didn’t get off. [Lucas] was yelling, ‘Get the dog off of me. Get the dog off of me. It’s going to ‘F’ up my career. It’s going to ‘F’ up my career.’ After that, an older lady came up and was, like, ‘Get off of him. Get off of him. Oh, no, not again.’ After that, the dog got off [Lucas] and she took the dog in the house.”

(Graham EBT at 7, lines 7–25.) Mr. Graham described the dog as an American pit bull, medium-sized, about 50 to 60 pounds. Mr. Graham further stated that he had seen Platt walking the dog in the neighborhood two or three times prior to the incident, the first time being about six months prior to the incident.

Mr. Graham stated that the dog was biting Lucas “[a]ggressively” with a “strong grip, trying to pull him off the car.” (*Id.* at 8, line 18; at 9, lines 6–7.) Mr. Graham estimated that the dog was biting Lucas for “[a]bout two to three minutes.” (*Id.* at 9, line 17.) Mr. Graham stated that he heard a “faint growl” coming from the dog as it bit Lucas. (*Id.* at 35, line 24.) Mr. Graham indicated that, as Lucas was trying to shake the dog off his leg, Mr. Graham hit the dog in the ribs more than ten times, but the dog continued to hold onto Lucas. Mr. Graham stated that Ms. Abdus “was trying to get the dog [and said] ‘[g]et off of him’ and [was] doing what she had to do, but the dog was not listening to her at all.” (*Id.* at 39, lines 11–13.) Mr. Graham then stated that he observed Platt come outside, say, “Get off of him. Get off of him. Oh, no, not again”, and grab the dog by the neck. Mr. Graham next stated that, at that time, he observed that the dog was not wearing a collar. Mr. Graham described the dog as “still aggressive” after Platt grabbed him, as Platt was taking him indoors after Taurus released Lucas’s leg. (*Id.* at 40, lines 17–24.)

When asked whether he knows of a neighbor named Wendy, Mr. Graham replied that he has known a woman by the name of Wendy Murray for about 40 years. Mr. Graham stated that

he had seen Ms. Murray a few days before his EBT out walking her four Rottweilers and that he believes she lives on 127th Street between Saint Nicholas Terrace and Convent Avenue.

Plaintiff's Submissions in Opposition to Platt's Motion for Summary Judgment

Plaintiff argues in his opposition papers, in sum and substance, that Taurus's vicious propensities may be inferred from the nature and results of Taurus's attack on Lucas, from that Taurus was a pit bull and Defendant knew Taurus was a pit bull, and from that Taurus had been returned by a prior owner. Plaintiff further argues that the alleged statement by Defendant, per the Graham EBT, "Get off of him. Get off of him. Oh, no, not again.", constitutes both an admission against interest and an excited utterance—exceptions to the hearsay rule—and creates a triable issue of material fact as to Defendant's knowledge of Taurus's vicious propensities. Plaintiff further argues that Platt's apologies constitute an admission against interest. Plaintiff further argues that hearsay may be considered in opposition to a motion for summary judgment.

Records from Animal Care & Control of New York City

Plaintiff has annexed two exhibits to his opposition papers. Exhibit A to Lucas's opposition papers is a series of documents from Animal Care & Control of New York City (AC&C). (Kenny affirmation, exhibit A [AC&C Records].) The AC&C Records state that a dog named "Cheesecake", a pit bull mix with Animal ID no. A1016393, was brought to AC&C on October 4, 2014. (AC&C Records at 1.) On a page labeled "Memos For A1016393", a memo dated October 5, 2014, at 12:53 a.m., states, "Dog was growling upon intake. When this dog was tethered to the wag he lunged at staff while they were walking by. Be very careful when dealing with this dog." (*Id.* at 2.) A further memo states that "This dog attacked a man as he was walking past him" and lists Lucas as "victim" and Platt as "[o]wner." (*Id.*) A further memo indicates that, on a phone call with AC&C, Platt identified the dog "Cheesecake" as "Taurus." (*Id.* at 3.) Further notes indicate that Platt stated that she was not interested in reclaiming Taurus, that AC&C requested to euthanize Taurus, and that staff were directed to proceed with the euthanasia on October 18, 2014. (*Id.* at 4–5.) A medical history report indicates that Taurus weighed 46.80 pounds and, on October 7, 2014, was noted as "very tense, nervous during exam." (*Id.* at 6.)

Records from the Office of Veterinary Public Health Services

Exhibit B to Lucas's opposition papers is documentation responsive to Plaintiff's counsel's FOIL request of the Office of Veterinary Public Health Services. (Kenny affirmation, exhibit B [DOH Records]). On a page with New York City Department of Health and Mental Hygiene ("DOH") letterhead and the title "Case Information", a report indicates that a pit bull named "Cheesecake", with "ACC Intake No. A1016393", bit Lucas on October 4, 2014. (DOH Records at 2.) The Case Information page lists Platt as Cheesecake's owner. A DOH "Bite Report", dated October 5, 2014, states that Cheesecake was a male, unneutered pit bull mix of approximately two years of age. (*Id.* at 7.) The Bite Report indicates that the dog, owned by Platt, bit Lucas on October 4, 2014, at 5:35 p.m.

Defendant's Reply in Further Support of Platt's Motion for Summary Judgment

Defendant argues in her reply papers that she has shown prima facie entitlement to judgment as a matter of law and that Lucas has failed to raise an issue of fact in response. Defendant argues that the nature and severity of a dog bite, alone, may not raise an issue of fact as to a dog's prior vicious propensities. Defendant further argues that the nature and severity of a dog bite is, rather, one of many factors a court may consider in determining whether a dog exhibited prior vicious propensities. Defendant then argues that Platt's alleged statement, "Oh, no, not again.", is inadmissible hearsay. Defendant further argues that Plaintiff's interpretation that the alleged statement was referring to Platt's prior knowledge of Taurus's vicious propensities is "wholly speculative." (Spellman reply affirmation ¶ 14.) Defendant then admits that Platt apologized to Plaintiff but that the apology is irrelevant to the issue of whether Taurus had prior vicious propensities.

Oral Argument

On January 8, 2018, the parties appeared by their counsel for oral argument on the instant motion. At oral argument, counsel reiterate the arguments made in their motion papers.

Notably, the Court questioned counsel for Plaintiff as to evidence from prior to the October 4, 2014 incident demonstrating Platt's knowledge of Taurus's vicious propensities. Counsel for Plaintiff indicated that Taurus's growl on the day he came to live with Platt, as recounted in the Abdus EBT, was one such evidentiary submission. Plaintiff then indicated that Taurus's having been given away by his prior owner was another such submission. Plaintiff next indicated that the breed of dog—here, a pit bull mix—can be considered as a factor in determining whether a dog has vicious propensities.

At the close of oral argument, the Court stated that it would reserve its decision on the motion until it received the oral argument transcript. The Court received the transcript on April 30, 2018.

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "The proponent of a summary judgment motion must 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 New York University Medical Center*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].) "On a motion for summary judgment, facts must be viewed in the light most

favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

In the first instance, Lucas’s first cause of action, sounding in negligence, cannot be sustained in this state and must be dismissed as a matter of law. (See *Scavetta v Wechsler*, 149 AD3d 202 [1st Dept 2017].) As such, the Court will now consider whether to dismiss Lucas’s cause of action sounding in strict liability.

“For at least 188 years, the law of this state has been that the owner of a domestic animal who either knows or should have known of that animal’s vicious propensities will be held liable for the harm the animal causes as a result of those propensities.” (*Doerr v Goldsmith*, 25 NY3d 1114, 1121 [2015, Abdus-Salaam, J., concurring], quoting *Collier v Zambito*, 1 NY3d 444, 446 [2004].) “The ‘vicious propensity’ doctrine[] provides for strict liability against [such] an owner . . . [and] [t]he term ‘vicious propensity’ has become a term of art.” (*Scavetta*, 149 AD3d at 205.) “Under this rule, a ‘vicious propensity’ is the propensity to do any act that might endanger the safety of the persons and property of others in a given situation, including behavior that is dangerous but not necessarily aggressive.” (*Doerr* at 1121. [internal quotation marks and citation omitted].) “[W]hile knowledge of vicious propensities may of course be established by proof of prior acts of a similar kind of which the owner had notice, a triable issue of fact as to whether the owner knew or should have known that its animal harbored vicious propensities may be raised by proof of something less.” (*Bard v Jahnke*, 6 NY3d 592, 597 [2006], citing *Collier* at 446.) “In order to establish liability, there must be some evidence that the dog demonstrated vicious propensities prior to the incident.” (*Gervais v Laino*, 112 AD3d 545, 546 [1st Dept 2013].)

“Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog’s tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm.” (*Lillo-Arouca v Masoud*, — NYS3d—, 2018 WL 3371575, *1, 2018 NY Slip Op. 05150, *1 [2d Dept, July 11, 2018] [quotation marks and citations omitted].) For nearly 100 years, it has been the rule in the Appellate Division, First Department that a finding that a dog possesses vicious propensities may be “proved by the nature of the attack and the ferocity with which it was kept up.” (*Perrotta v Picciano*, 186 AD 781, 783 [1st Dept 1919]; see also *Matthew H. v County of Nassau*, 131 AD3d 135, 148 [2d Dept 2015] [holding that, “given the intensity and ferocity of the attack on the infant plaintiff, [the defendants] failed to eliminate all triable issues of fact as to whether they knew or should have known of the vicious propensities of the dogs.”] “[A]n attack that is severe and unprovoked is [some] indicia of vicious propensities.” (*Sherman v Torres*, 35 AD3d 436, 437 [2d Dept 2006].)

The Appellate Division, Third Department has held that a single instance of a dog growling at a person that the dog would later bite is not enough, standing alone, to show that the dog had vicious propensities. (See *Brooks ex rel. Brooks v Parshall*, 25 AD3d 853, 854 [3d Dept 2006]; see also *Gervais*, 112 AD3d at 547, citing *Brooks*.) Moreover, it is error for a court to take judicial notice of the generally vicious nature of a dog’s breed as supporting evidence

concerning the behavior of one specific dog. (*See Carter v Metro North Assocs.*, 255 AD2d 251, 251–252 [1st Dept 1998]; *Rivers v New York City Hous. Auth.*, 264 AD2d 342, 342 [1st Dept 1999] [holding that the motion court “erred in taking judicial notice of the vicious nature of pit bulls”].) The Court of Appeals has “never [] held that particular breeds or kinds of domestic animals are dangerous, and therefore when an individual animal of the breed or kind causes harm, its owner is charged with knowledge of vicious propensities.” (*Bard*, 6 NY3d at 599.) “[V]icious propensities may not be inferred solely from the fact that [a] dog was of the pit bull breed.” (*Ortiz v New York City Hous. Auth.*, 105 AD3d 652, 653 [1st Dept 2013].) Nevertheless, the Appellate Division, Third Department has held that “[t]he breed of the dog, although not sufficient to raise a question without further evidence, can be considered in the overall analysis.” (*Loper ex rel. Loper v Dennie*, 24 AD3d 1131, 1133 [3d Dept 2005].)

“Even a dog which has not previously bitten or attacked may subject its owner or harborer [sic] to strict liability where its propensities are apparent.” (*Matthew H.*, 131 AD3d at 147–148 [2d Dept 2015] [disavowing the “so-called ‘one free bite’ rule”]; *see also Perrotta*, 186 AD at 783 [holding that “[t]he popular theory that ‘every dog is entitled to one bite’ finds no support in the decisions of the courts of this state”]; *Kennet v Sosnitz*, 260 AD 759, 760–761 [1st Dept 1940] [“the doctrine that every dog is entitled to ‘one free bite’, if it ever prevailed in this state, is no longer followed”]; *Collier*, 1 NY3d at 448 [dog owners are not entitled to “an automatic ‘one free bite’”]; *Bard*, 6 NY3d at 599 [“a common shorthand name for our traditional rule—the ‘one-bite rule’—is a misnomer”].)

Based upon the papers and the oral argument on the instant motion, the Court finds that Platt has failed to show *prima facie* entitlement to judgment as a matter of law as to Plaintiff’s second cause of action, sounding in strict liability. The evidence Platt submitted in support of her motion has raised triable issues of fact as to whether Taurus had vicious propensities and, if so, whether Platt had or should have had knowledge of those propensities prior to the October 4, 2014 incident. (*See Velez v Andrejka*, 126 AD3d 685, 686 [2d Dept 2015].)

Specifically, Platt submitted the Graham EBT in support of her motion. According to the transcript, after Taurus had been biting Lucas for a few minutes, Mr. Graham observed Platt come outside, heard Platt say, “Get off of him. Get off of him. Oh, no, not again.”, and then further observed Platt grab Taurus by the neck, whereupon Taurus released Lucas’s leg from his mouth’s grip.

This alleged statement by Platt is hearsay, “an out-of-court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.” (Guide to NY Evid rule 8.00, Definition of Hearsay; *see People v Nieves*, 67 NY2d 125, 131 [1986].) “Hearsay is not admissible unless it falls within an exception to the hearsay rule as provided by case law or as required by the Federal Constitution or the New York State Constitution.” (Guide to NY Evid rule 8.01, Admissibility of Hearsay; *see Nucci v Proper*, 95 NY2d 597, 602 [2001].)

Two such exceptions apply to Platt’s statement from the Graham EBT: admission by party and excited utterance. “A statement of a party which is inconsistent with the party’s position in the proceeding is admissible against that party, if the statement is . . . made by a party

in an individual [] capacity and offered against the party in that capacity[.]” (Guide to NY Evid rule 8.03, Admission by Party; *see Reed v McCord*, 160 NY 330, 341 [1899].) “A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible [] provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.” (Guide to NY Evid rule 8.17, Excited Utterance; *see People v Johnson*, 1 NY3d 302, 306 [2003].)

Given the circumstances presented in this case, the Court finds that the statement claimed to have been made by Platt at or about the time of the attack meets the tests to be applied in determining the admissibility of either an admission by a party or an excited utterance. Further, the Court finds that the statement claimed to have been made by Platt, “Get off of him. Get off of him. Oh, no, not again.”, viewed in the light most favorable to Plaintiff, the non-moving party, raises a triable issue of fact as to whether Taurus had vicious propensities and whether Platt had knowledge of them prior to the October 4, 2014 incident.

Platt also submitted the Lucas EBT in support of her motion. According to the transcript, Lucas indicated that Wendy Murray was aware of Taurus having attacked two other people in the neighborhood and that Ms. Murray had witnessed one such attack. While Lucas’s statements regarding what Ms. Murray told him are hearsay that does not fall within an exception to the hearsay rule, “hearsay evidence is admissible to defeat a motion for summary judgment provided that it is not the only evidence.” (*Blanc-Kousassi v Carrington*, 144 AD3d 470, 470 [1st Dept 2016].) Here, the potential for eyewitness testimony at the time of trial from Ms. Murray, substantiating that Taurus previously attacked another person, in light of the statement, “Get off of him. Get off of him. Oh, no, not again.”, from the Graham EBT, amplifies the issue of fact.

The Court finds further that the nature and severity of the attack on Lucas, including Taurus’s alleged aggression immediately beforehand—his barking, standing on hind legs, bearing his teeth, and straining against, pulling on, and eventually breaking his leash—and including the alleged strength and duration of his bite on Lucas’s leg, despite the substantial efforts of Mr. Graham and Ms. Abdus to get Taurus off Lucas, further serves to amply the issue of fact.

While the Court need not consider the sufficiency of Plaintiff’s opposition papers (*see Winegrad*, 64 NY2d at 853; *Velez*, 126 AD3d at 687), the Court notes that the issue of fact is further amplified by the AC&C Records, which document Taurus’s growling and lunging at people at the shelter on the night of the incident.

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant Carla Platt pursuant to CPLR 3212 for summary judgment in favor of Defendant and against Plaintiff Melvin Lucas on Plaintiff's amended verified complaint is granted in part and denied in part to the extent that it is

ORDERED that paragraphs 25 through 27 of the amended verified complaint are stricken, the first cause of action, sounding in negligence, is dismissed, and the motion is otherwise denied; and it is further

ORDERED that Plaintiff is directed, within 20 days of entry of this order, to serve a copy of this order with notice of entry upon Defendant.

The foregoing constitutes the decision and order of the Court.

Dated: July 20, 2018
New York, New York


J.S.C.
HON. ROBERT D. KALISH

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

- ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE