SHORT FORM ORDER

INDEX No. 15-611901
CAL. No. 17-02533OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice Supreme Court

MOTION DATE 4-26-18 (001 & 002)
ADJ. DATE 5-16-18
Mot. Seq. # 001 - MG
002 - MG; CASEDISP

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JOSEPHINE LAWLOR,

Plaintiff,

- against -

DIANE SCHWARTZ JOSEPH KLATZSKO and JOANNE KLATZSKO,

Defendants.

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Upon the following papers numbered 1 to 68 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 33 ; Notice of Cross Motion and supporting papers 34 - 49 ; Answering Affidavits and supporting papers 50 - 60; 61 - 62 ; Replying Affidavits and supporting papers 63 - 66; 67 - 68 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Diane Schwartz and the motion by defendants Joseph Klatzko and Joanna Klatzko are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Diane Schwartz for summary judgment dismissing the complaint and cross claims against her is granted; and it is further

ORDERED that the cross motion by defendants Joseph Klatzko and Joanna Klatzko for summary judgment dismissing the complaint and cross claims against them is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Josephine Lawlor on August 31, 2015, when she was bitten by a dog owned by defendants Joseph Klatzko and Joanne Klatzko, improperly sued herein as Joseph Klatzsko and Joanna Klatzsko. The attack occurred when plaintiff entered the house of the premises owned by defendant Diane Schwartz, where the Klatzko defendants resided, located in Mastic Beach, New York. The plaintiff alleges that defendants were negligent in, among other things, permitting a dangerous dog on their property.

Schwartz now moves for summary judgment dismissing the complaint on the ground that she had no notice the dog had vicious propensities. Schwartz submits, in support of the motion, copies of the pleadings, the bill of particulars, the note of issue, and the transcripts of the deposition testimony of the parties. The Klatzko defendants also move for summary judgment dismissing the complaint of the ground that they had no notice the dog had vicious propensities. They submit, in support of the motion, copies of the pleadings, the bill of particulars, and the transcripts of their deposition testimony.

The Court notes that plaintiff's purported cross motion was considered only as opposition to defendants' motions, as she did not file and serve a notice of cross motion (*see* CPLR 2215). In opposition to defendants' motions, plaintiff argues that the dog had vicious propensities, and that defendants knew or should have known of those propensities. Plaintiff submits, in opposition, photographs, the affidavit of Lynda Loudon Sheppard, D.V.M., a digital versatile disc containing video footage and an affidavit of authentication, and the transcripts of the deposition testimony of the Klatzko defendants, plaintiff, and Donald Lawlor.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320; ***Zuckerman v City of New York***, 49 NY2d 557).

"[C]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animal's vicious propensities, not on theories of common-law negligence" (***Morse v Colombo***, 31 AD3d 916, 917; *see* ***Claps v Animal Haven, Inc.***, 34 AD3d 715). "To recover in strict liability for damages caused by a dog bite, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog, or person in control of the premises where the dog was, knew or should have known of such propensities" (***Christian v Petco Animal Supplies Store, Inc.***, 54 AD3d 707, 707-708; *see* ***Petrone v Fernandez***, 12 NY3d 546; ***Bard v Jahnke***, 6 NY3d 592; ***Collier v Zambito***, 1 NY3d 444). "Vicious propensities include the propensity to do any act that might endanger the safety of the person and property of others" (*see* ***Lillo-Arouca v Masoud***, 165 AD3d 646). "Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl, snap or bare

its teeth, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm" (***Curbelo v Walker***, 81 AD3d 772, 773; *see* ***Bard v Jahnke***, 6 NY3d 592; ***Collier v Zambito***, 1 NY3d 444; ***Xin Kai Li v Miller***, 150 AD3d 1051; ***Carroll v Kontarinis***, 150 AD3d 960). "A similar act by the dog, such as a prior biting incident, imputes knowledge of vicious propensity" (***Morse v Colombo***, 8 AD3d 808, 808). Owners or harborers of a dog with vicious propensities are not entitled to the benefit of the so-called "one free bite" rule (*see* ***Matthew H. v County of Nassau***, 131 AD3d 135). As such, even dogs which have not previously bitten or attacked may subject its owners or harborers to strict liability where its propensities are apparent (*see* ***Collier v Zambito***, 1 NY3d 444; ***Matthew H. v County of Nassau***, 131 AD3d 135). Knowledge of an animal's vicious propensities may also be discerned from the nature and result of the attack (*see* ***Matthew H. v County of Nassau***, 131 AD3d 135; ***Francis v Becker***, 50 AD3d 1507; ***Lynch v Nacewicz***, 126 AD2d 708).

The Klatzko defendants made a prima facie showing of their entitlement to summary judgment through submissions that the dog did not have vicious propensities, and that, even if it did, they had no knowledge of such vicious propensities (*see* ***Lillo-Arouca v Masoud***, 163 AD3d 646; ***Carroll v Kontarinis***, 150 AD3d 960; ***Bueno v Seecharan***, 136 AD3d 702; ***Curbelo v Walker***, 81 AD3d 772; ***Christian v Petco Animal Supplies Store, Inc.***, 54 AD3d 707). Joanna Klatzko testified that the subject dog had never been muzzled before the incident and never jumped on people. Joseph Klatzko testified that the dog never bit or tried to bite anyone before the incident. Mr. Klatzko also testified that no one complained about the dog prior to the incident.

The burden now shifts to the non-moving parties to raise a triable issue of fact as to whether the dog had vicious propensities and whether defendants had knowledge of the dog's vicious propensities (*see* ***Alvarez v Prospect Hosp.***, *supra*). Contrary to the assertions by plaintiff's counsel, evidence of a "beware of dog[s]" sign is insufficient to raise a triable issue of fact with respect to vicious propensity (*see* ***Vallejo v Ebert***, 120 AD2d 737; ***Palumbo v Nikirk***, 59 AD3d 691). Evidence that the dog barked when strangers approached the front door is also insufficient to raise a triable issue of fact (*see* ***Ioveno v Schwartz***, 139 AD3d 1012).

To recover against a landlord, the plaintiff must prove that the defendant "(1) had notice that the dog was being harbored on the premises; (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog" (***Kraycer v Fowler St., LLC***, 147 AD3d 1038, 1039, quoting ***Sarno v Kelly***, 78 AD3d 1157, 1157; ***Kim v Hong***, 143 AD3d 804; ***Velez v Andrejka***, 126 AD3d 685). Defendant Schwartz made a prima facie showing of her entitlement to summary judgment through submissions that she had no knowledge of the dog's vicious propensities (*see* ***Curbelo v Walker***, 81 AD3d 772; ***Sarno v Kelly***, 78 AD3d 1157; ***Christian v Petco Animal Supplies Store, Inc.***, 54 AD3d 707; ***Lebron v. New York City Housing Authority***, 268 AD2d 563). Schwartz testified that she was aware of the dog's presence on the property, and that she was not aware of the dog's vicious propensities before the incident. She also testified that she never received complaints about the dog or knew the dog to have issues with people. Furthermore, Schwartz stated that the dog had never bitten anyone previous to the subject incident.

Schwartz having met her initial burden on the motion, the burden shifted to the nonmoving parties to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557). Plaintiff argues that

Schwartz was not a landlord, because there was no written lease, she is the sister of Joanna Klatzko, and Joseph Klatzko performed maintenance on the premises. While Joseph Klatzko testified that he paid $1,900 in monthly rent, fixed fence panels, and installed gates, plaintiff failed to submit evidence that such maintenance was performed in exchange for a reduced rent that would establish Schwartz's vicarious liability (*cf.* ***Wilson v Livingston***, 305 AD2d 585). Plaintiff failed to demonstrate that Schwartz knew or should have known of the dog's vicious propensities (*see* ***Lebron v. New York City Housing Authority***, 268 AD2d 563).

Accordingly, the motions by defendants for summary judgment dismissing the complaint are granted.

Dated: October 11, 2018

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION