Johnson v Rao
2019 NY Slip Op 33299(U)
October 31, 2019
Supreme Court, New York County
Docket Number: 152587/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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ALAN JOHNSON and LISA ANN JOHNSON, Index No. 152587/2014

Plaintiffs

- against - DECISION AND ORDER

KALPANA RAO, NARAYAN RAJ, ELEMENT CONDOMINIUM, and DOUGLAS ELLIMAN PROPERTY MANAGEMENT,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND AND UNDISPUTED FACTS

Plaintiffs, husband and wife, sue for injuries plaintiff Alan Johnson suffered when a dog owned by defendants Rao and Raj attacked Johnson in an elevator in a residential condominium owned by defendant Element Condominium and managed by the condominium's agent defendant Douglas Elliman Property Management at 555 West 59th Street, New York County. Plaintiffs, Rao, and Raj owned and resided in condominium units in the building.

On May 30, 2011, Johnson, Raj, and his dog Ibiza boarded a public passenger elevator inside the building. Once inside, Johnson asked if he might pet Ibiza, to which Raj assented. Johnson lowered his hand to Ibiza to allow the dog to sniff him, and, after the dog appeared to accept Johnson's hand, Johnson knelt down to face and pet the dog. After Johnson pet Ibiza, as Johnson was standing up, the dog barked at him, lunged at him, and bit his face, tearing off pieces of his nose and lip. Raj

immediately pulled the dog away from Johnson, but not before he had suffered severe facial injuries that required plastic surgery.

After the incident, Element Condominium and Douglas Elliman Property Management (the condominium defendants) sent Rao and Raj a letter requesting that they muzzle Ibiza until the condominium concluded an investigation. The condominium defendants also sent a letter to all residents of the building notifying them of the attack and of the condominium defendants' requirement that Rao and Raj muzzle the dog in the building's common areas and transport the dog only in the building's service elevators. Despite these letters, Johnson testified at his deposition that after the attack he encountered Ibiza in the passenger elevator and elsewhere in the building's common areas without a muzzle on multiple occasions.

Plaintiffs claim defendants' strict liability and negligence, including negligent infliction of emotional distress, and seek damages for Johnson's personal injuries and his wife's loss of his services and society. Plaintiffs also claim that the condominium defendants breached the rules incorporated in the condominium by-laws by allowing Rao and Raj to keep a vicious dog and bring it into the building's common areas both before and after the attack.

Defendants Rao and Raj cross-claim against the condominium defendants for contribution and implied indemnification, alleging that any negligence of Rao or Raj was derivative of the

condominium defendants' negligence. The condominium defendants cross-claim against Rao and Raj for contribution, implied indemnification, contractual indemnification, and breach of a contract to procure insurance naming the condominium defendants as insureds on the policy, but now discontinue the cross-claim for contractual indemnification. Defendants Rao and Raj and, separately, the condominium defendants move for summary judgment dismissing the complaint and all cross-claims. C.P.L.R. § 3212(b).

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, defendants must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if defendants satisfy this standard, does the burden shift to plaintiffs and co-defendants to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the

evidence for purposes of defendants' motions, the court construes the evidence in the light most favorable to plaintiffs and co-defendants. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

III. THE CONDOMINIUM DEFENDANTS' MOTION IS TIMELY.

Plaintiffs claim that the condominium defendants' motion for summary judgment is untimely because it was filed after the deadline set in the December 2016 Preliminary Conference Order, which required defendants to file dispositive motions within 120 days "from all EBTs." Aff. of Richard C. Prezioso Ex. L, at 2. A stipulated Status Conference Order dated May 10, 2018, however, permitted plaintiffs to conduct nonparty examinations before trial (EBTs) until the filing of the note of issue, Prezioso Aff. Ex. K, and plaintiffs had yet to file the note of issue when the condominium defendants moved for summary judgment. Plaintiffs nonetheless maintain that the Preliminary Conference Order required defendants to move for summary judgment within 120 days of the last EBT August 14, 2017, because, even though plaintiffs obtained permission to conduct EBTs after May 10, 2018, and until filing the note of issue, plaintiffs never conducted any deposition after August 14, 2017.

Plaintiffs' position would require defendants to anticipate plaintiffs' waiver of their requested and granted right to

conduct further depositions. While the Preliminary Conference Order required defendants to file their dispositive motions within 120 days after EBTs were completed, plaintiffs were permitted to complete EBTs until they filed the note of issue, in obtaining the May 2018 order signaled an intention to conduct further EBTs until filing the note of issue, and had not filed the note of issue when the condominium defendants moved for summary judgment. Therefore defendants' time to file dispositive motions did not begin to run until the note of issue was filed and no more EBTs were permitted. Even if the condominium defendants' motion was untimely under the Preliminary Conference Order, its ambiguity and defendants' interpretation of the order consistent with the above interpretation constitute good cause for their late filing. Diaz v. 313-315 W. 125th St., 138 A.D.3d 599, 600 (1st Dep't 2016); Vila v. Cablevision of NYC, 28 A.D.3d 248, 249 (1st Dep't 2006).

IV. NEGLIGENCE AND STRICT LIABILITY

A. Legal Standards

Since plaintiffs' injuries were caused by a domestic animal, plaintiffs may not claim ordinary negligence against defendants and must rely solely on plaintiffs' strict liability claims. Doerr v. Goldsmith, 25 N.Y.3d 1114, 1116 (2015); Petrone v. Fernandez, 12 N.Y.3d 546, 550 (2009); Bard v. Jahnke, 6 N.Y.3d 592, 615 (2006); Scavetta v. Wechsler, 149 A.D.3d 202, 206 (1st Dep't 2017). Defendants Rao and Raj, as Ibiza's owners, and the condominium defendants are strictly liable for harm caused by

Ibiza if they knew or had reason to know of the dog's vicious propensity. Bloomer v. Shauger, 21 N.Y.3d 917, 918 (2013); Petrone v. Fernandez, 12 N.Y.3d at 550; Collier v. Zambito, 1 N.Y.3d 444, 446 (2004); Scavetta v. Wechsler, 149 A.D.3d at 205.

"Vicious propensity" is defined as the propensity to endanger the safety of persons or property. Collier v. Zambito, 1 N.Y.3d at 446; Scavetta v. Wechsler, 149 A.D.3d at 205. To establish a dog's vicious propensity, plaintiffs are not required to show that the dog has bitten anyone previously. Doerr v. Goldsmith, 25 N.Y.3d at 1116; Bard v. Jahnke, 6 N.Y.3d at 615; Collier v. Zambito, 1 N.Y.3d at 448. Plaintiffs may establish the dog's vicious propensity through evidence that the owner restrained the dog and of the type of the restraint, as well as the dog's history of growling, snapping, or baring its teeth. Collier v. Zambito, 1 N.Y.3d at 447; Bukhtiyarova v. Cohen, 172 A.D.3d 1153, 1155 (2d Dep't 2019); Deloach v. Nicholson, 171 A.D.3d 700, 701 (2d Dep't 2019); Olsen v. Campbell, 150 A.D.3d 1460, 1462 (3d Dep't 2017). A dog's breed, alone, does not establish its vicious propensity. Bard v. Jahnke, 6 N.Y.3d at 599; Ortiz v. New York City Hous. Auth., 105 A.D.3d 652, 652 (1st Dep't 2013); Joe v. Orbit Indus., 269 A.D.2d 121, 122 (1st Dep't 2000).

B. Defendants' *Prima Facie* Defense

Defendants Rao and Raj and the condominium defendants establish that they neither knew nor had reason to know of Ibiza's vicious propensity before her attack on Johnson. Raj

testified at his deposition about Ibiza's "sweet" temperament and lack of aggressive behavior before the attack. Aff. of John J. Nicolini Ex. G, at 99; Prezioso Aff. Ex. H, at 99. Raj had never seen Ibiza growl, snap, snarl, show her teeth, or bite at any person before the attack. Nicolini Aff. Ex. G, at 104, 108-109; Prezioso Aff. Ex. H, at 104, 108-109. Other strangers previously had approached and pet Ibiza similarly to Johnson, without incident. Nicolini Aff. Ex. G, at 169-70; Prezioso Aff. Ex. H, at 169-70. Raj explained that he did not muzzle Ibiza because he had no reason to, as she was a friendly dog. Nicolini Aff. Ex. G, at 171; Prezioso Aff. Ex. H, at 171.

Rao's deposition testimony corroborates Raj's testimony. Rao testified that Ibiza was a calm, affectionate, and happy dog and exhibited no threatening behavior before the dog's attack on Johnson. Nicolini Aff. Ex. H, at 15, 20-21; Prezioso Aff. Ex. I, at 15, 20-21. Rao confirmed that Ibiza had never growled, snarled, or even barked at other dogs, their owners, or their walkers and did not wear or need a muzzle before the attack. Nicolini Aff. Ex. H, at 19-20; Prezioso Aff. Ex. I, at 19-20.

Finally, James Xanthos, the condominium defendants' account executive managing the condominium, and Nicholaus Williamson, a doorman for the building, each testified at his deposition that he was unaware of any complaints or incidents involving Ibiza or any other dog in the building, Nicolini Aff. Exs. I, at 43; J, at 24, 84-85; Prezioso Aff. Exs. G, at 43; J, at 24, 84-85, as did both plaintiffs. Nicolini Aff. Exs. D, at 25-26; F, at 24-25;

Prezioso Aff. Exs. E, at 25-26; F, at 24-25. Alan Johnson specifically testified that he had observed Ibiza in the building before May 30, 2011, but had not observed or heard her growl, snap, show her teeth, or lunge. Nicolini Aff. Ex. D, at 24-25; Prezioso Aff. Exs. E, at 24-25.

C. Plaintiffs' Rebuttal to Rao and Raj

Plaintiffs in opposition, however, raise factual issues regarding Rao's and Raj's knowledge of Ibiza's vicious propensity, relying in part on the affidavit of Ron Berman, a canine behavioral consultant and trainer. Berman concludes that, based on authenticated photographs of Ibiza's physical characteristics, Ibiza is a pit bull mix and that pit bulls are willing to attack and fight. Aff. of Howard F. Strongin & Alexander N. Blake Ex. 5 ¶¶ 7-8, 12, 14. When a pit bull is aggressive, it is more likely to bite a stranger without provocation. Id. ¶ 13. Based on the undisputed facts that Ibiza attacked Johnson as he backed away from petting her and was in a non-threatening position and that Ibiza escalated her attack on Johnson as he moved away, Berman concludes that Ibiza is a fear-aggressive dog, which is fearful and manifests this fearfulness through aggression. Id. ¶¶ 22-23, 34, 36-37. A fear-aggressive dog will attack offensively and increase its aggression as the victim moves away, despite the decreasing threat, rather than attack defensively when the victim is close or threatening the dog. Id. ¶¶ 34, 36-37. Berman also concludes that Ibiza's sensitive intestinal tract, diarrhea, and uncontrolled or

frequent urination to which her owners testified were medical conditions consistent with a fearful dog. Id. ¶ 24.

According to Berman, Raj's testimony that Raj cautiously directed strangers to allow Ibiza to smell their hand before they pet Ibiza demonstrates that Raj was anxious about Ibiza's negative reaction to strangers and suggests that Raj feared Ibiza would react aggressively toward a stranger. Id. ¶ 33. Raj's testimony that Ibiza barked and growled at other dogs in a confined area gave Raj notice that Ibiza was aggressive, particularly if deep, guttural barks, which were especially indicative of aggression, accompanied her growling. Id. ¶¶ 31-32. On these grounds Berman concludes that Rao and Raj either knew or had reason to know of Ibiza's aggression and thus her vicious propensity. Id. ¶ 40.

Berman recounts that, to arrive at his conclusions, he interviewed Joan Roney, a dog trainer and behavioral therapist, whom Rao and Raj admitted they hired to provide obedience training to Ibiza for behavioral therapeutic purposes. They further admitted that they maintained an ongoing relationship with Roney to train Ibiza's walkers in handling Ibiza. Roney corroborated that Rao and Raj hired Roney to help with Ibiza's behavior and informed Berman that Ibiza demonstrated behavioral problems related to fearfulness and was nervous and scared when meeting new persons. Id. ¶¶ 16-19.

While the information from Roney is inadmissible hearsay, Hinlicky v. Dreyfuss, 6 N.Y.3d 636, 648 (2006); People v.

Goldstein, 6 N.Y.3d 119, 126 (2005); Brown v. Speaker, 66 A.D.3d 422, 424 (1st Dep't 2009), defendants do not challenge Berman's qualifications as an expert, nor suggest, let alone demonstrate through an expert of their own, that Berman's interview with Ibiza's trainer is unaccepted data to be used by a canine behavioral consultant and trainer to formulate or validate his opinions. State of New York v. Floyd Y., 22 N.Y.3d 95, 107-108 (2013); Hinlicky v. Dreyfuss, 6 N.Y.3d at 648; People v. Goldstein, 6 N.Y.3d at 124; Brown v. Speaker, 66 A.D.3d at 423-24. Notably, even if Berman disregarded the confirmatory data from Roney, the testimony by Raj, Rao, and Johnson independently provided Berman similar data. Evidence independent of Roney's statements thus supports Berman's conclusions.

Berman explains that Roney's observations of Ibiza's behavioral problems related to fearfulness, her nervousness and fear when leaving the building and meeting new persons, and her negative reaction to persons coming close to interact with her, Strongin & Blake Aff. Ex. 5 ¶¶ 17-20, simply provided corroborating evidence of Ibiza's fearfulness. Id. ¶ 21. Berman concludes that Ibiza was fearful, with a fear-aggressive temperament, and demonstrated aggressive behavior because of this temperament, based on other admissible evidence: Raj's testimony regarding Ibiza barking and growling at other dogs, as well as Johnson's testimony regarding the circumstances of Ibiza's attack on Johnson. Id. ¶¶ 22-23, 31-32, 34-37. Excising Roney's hearsay statements and any conclusions based only on those

statements still leaves intact Berman's ultimate conclusion that Ibiza was fear-aggressive and behaved aggressively because of this temperament. To the extent any of his conclusions may be based on her statements alone, such conclusions are unnecessary to defeat summary judgment.

Berman's conclusions that Ibiza is part pit bull and thus likely to exhibit pit bull traits, with a history of medical conditions consistent with a fearful dog, are based in part on inadmissible veterinary records, but also on authenticated photographs and her owners' testimony. Again defendants do not claim that veterinary records are an unaccepted basis to be used by a canine behavioral consultant and trainer to arrive at or confirm his conclusions. State of New York v. Floyd Y., 22 N.Y.3d at 107-108; Hinlicky v. Dreyfuss, 6 N.Y.3d at 648; People v. Goldstein, 6 N.Y.3d at 124; Brown v. Speaker, 66 A.D.3d at 423-24.

Finally, Berman bases his conclusion that Rao and Raj knew or were on notice of Ibiza's vicious propensity solely on Raj's testimony. Raj testified regarding Ibiza's barking and growling, his cautious direction to strangers to offer their hand to Ibiza before petting her, and his discomfort with the interaction between Ibiza and Johnson when Johnson asked permission and crouched down to pet the dog, yet Raj did nothing to discourage that interaction. Raj's caution and discomfort must have derived from his knowledge of Ibiza's behavioral problems, as defendants offer no other explanation. Considering Roney's findings not for

their truth, but just for the fact that she imparted them to Berman, a stranger albeit a professional in her field, raises the inference that she imparted similar findings to the owners of the dog who had hired Roney to train the dog.

Consequently, Berman's opinion that Ibiza was a fear-aggressive pit bull mix and that this fearful-aggressiveness manifested itself both in Ibiza's barking and growling at other dogs and when Ibiza attacked Johnson raises a factual issue as to Ibiza's vicious propensity. Although neither Ibiza's breed, nor her barking and growling at other dogs, nor the brutality and circumstances of her attack singly is enough to evidence her vicious propensity, these factors together, when construed in a light most favorable to plaintiffs, are enough to raise the issue of her vicious propensity. Baisi v. Gonzalez, 97 N.Y.2d 694, 695 (2002); I.A. v. Mejia, 174 A.D.3d 770, 771-72 (2d Dep't 2019); Lipinsky v. Yarusso, 164 A.D.3d 896, 897-98 (2d Dep't 2018); Kim v. Hong, 143 A.D.3d 804, 806 (2d Dep't 2016). See Collier v. Zambito, 1 N.Y.3d at 448; Wittenburg v. Gabriellini, 158 A.D.2d 302, 302 (1st Dep't 1990). Berman's opinion that Rao and Raj knew or had reason to know of Ibiza's vicious propensity, because Raj witnessed Ibiza bark and growl at other dogs, cautiously directed strangers to allow Ibiza to sniff their hand before they pet her, and admitted his discomfort when Ibiza interacted with another person, is unchallenged. At minimum, this opinion likewise raises an issue whether Rao and Raj were on notice of Ibiza's vicious propensity. Therefore the court grants summary

judgment to Rao and Raj on their negligence, but denies them summary judgment on their strict liability.

D. Plaintiffs' Rebuttal to the Condominim Defendants

Berman's affidavit does not address whether the condominium defendants knew or had reason to know of Ibiza's vicious propensity, nor do plaintiffs present any other evidence demonstrating the condominium defendants' notice. The condominium's rules permitted defendants Rao and Raj to keep a dog. Prezioso Aff. Exs. G, at 42; O ¶ 12. Neither Ibiza nor any other dog had been involved in any prior complaint or incident that gave the condominium defendants notice of dogs in the building being a safety concern, let alone of Ibiza's vicious propensity. Id. Exs. G, at 42-43; J, at 24, 84-85. Therefore, to the extent that the complaint includes claims for strict liability against the condominium defendants, they are entitled to summary judgment dismissing plaintiffs' claims for strict liability as well as negligence. Orozco v. 725 S. Blvd., LLC, 82 A.D.3d 480, 480 (1st Dep't 2011); Espejo v. Reuven Holding Ltd., 308 A.D.2d 373, 373 (1st Dep't 2003); Bellocchio v. 783 Beck St. Hous. Dev. Fund Corp., 305 A.D.2d 253, 254 (1st Dep't 2003); Carter v. Metro N. Assoc., 255 A.D.2d 251, 251 (1st Dep't 1998).

V. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

To succeed at trial on plaintiffs' claims for negligent infliction of emotional distress, plaintiffs must show that defendants breached a duty owed to plaintiffs, that this breach unreasonably endangered or caused plaintiffs to fear for their

physical safety, and that this conduct was outrageous and extreme beyond all possible bounds of decency. Ferreyr v. Soros, 116 A.D.3d 407, 407 (1st Dep't 2014); Bour v. 259 Bleecker LLC, 104 A.D.3d 454, 455 (1st Dep't 2013); Bernstein v. E. 51st St. Dev. Co., LLC, 78 A.D.3d 590, 591 (1st Dep't 2010); Sheila C. v Povich, 11 A.D.3d 120, 130-31 (1st Dep't 2004). Real property owners owe persons on their property a duty of reasonable care to maintain the property in a safe condition. Maheshwari v. City of New York, 2 N.Y.3d 288, 294 (2004); Tagle v. Jakob, 97 N.Y.2d 165, 168 (2001); CB v. Howard Sec., 158 A.D.3d 157, 164-65 (1st Dep't 2018); Banner v. New York City Hous. Auth., 94 A.D.3d 666, 667 (1st Dep't 2012).

Plaintiffs claim defendants negligently caused them emotional distress by allowing Ibiza to attack Johnson, a claim duplicative of the claims addressed above, Napoli v. New York Post, 175 A.D.3d 433, 434 (1st Dep't 2019); Bacon v. Nygard, 140 A.D.3d 577, 578 (1st Dep't 2016); Wolkstein v. Morgenstern, 275 A.D.2d 635, 637 (1st Dep't 2000); McIntyre v. Manhattan Ford, Lincoln Mercury, 256 A.D.2d 269, 270 (1st Dep't 1998), and then by allowing Rao and Raj to transport Ibiza in the passenger elevators and around the building without a muzzle after the attack. Even if Rao and Raj callously flouted the condominium's directive to keep Ibiza muzzled and out of the passenger elevators after the attack, and the condominium defendants allowed this conduct, it is not so extreme or outrageous as to exceed beyond all possible bounds of decency and satisfy the high

standards for a claim of negligent infliction of emotional distress. Melendez v. City of New York, 171 A.D.3d 566, 567 (1st Dep't 2019); Bour v. 259 Bleecker LLC, 104 A.D.3d at 455; Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 363 (1st Dep't 2005). See Ferreyr v. Soros, 116 A.D.3d at 407. Therefore all defendants are entitled to summary judgment dismissing plaintiffs' claims for negligent infliction of emotional distress.

VI. BREACH OF CONTRACT

Plaintiffs claim that the condominium defendants breached the condominium's rules incorporated in its by-laws by allowing Rao and Raj to transport Ibiza in the passenger elevator before and after the attack. The rules governing the residential apartments in the building provide that:

> No pets other than dogs, caged birds, cats and fish (which do not cause a nuisance, health hazard or unsanitary condition), shall be permitted, kept or harbored in a Residential Unit without the same in each instance having been expressly permitted in writing by the Residential Board or the managing agent of the Residential section . . . . . In no event shall any Unit Owner maintain more than two (2) pets in a Unit without the consent of the Residential Board nor shall any bird, reptile, or animal be permitted in any public elevator in the Residential Section, other than the elevators designated by the Residential Board or the managing agent of the Residential Section for that purpose, or in any public portions of the Residential Section, unless carried or on a leash.

Prezioso Aff. Ex. O ¶ 12 (emphases added). This rule expressly permits owners to keep dogs as pets without prior consent, if they do not cause a nuisance, health hazard, or unsanitary condition. Since the condominium defendants establish the absence of any complaints, incidents, or other notice indicating

Ibiza caused a nuisance, hazard, or unsanitary condition before her attack on Johnson, the condominium defendants did not violate the rule by permitting Rao and Raj to keep Ibiza before the attack. The second clause of ¶ 12's second sentence only bars animals in any public elevator or public portion of the Residential Section without a leash or without being carried. Plaintiffs do not claim that Ibiza was in any public elevator or public portion of the condominium without a leash.

Plaintiffs also claim that the condominium defendants breached their duty to maintain safe premises by not inquiring whether Rao and Raj owned a pet that caused a nuisance or hazard when they moved into their unit. If the condominium defendants did not receive notice that Ibiza was causing a nuisance or hazard over her years in the building before the attack, plaintiffs fail to show how in an initial inquiry the condominium defendants would have learned more than they learned over the years of observing Ibiza that would have raised a concern. Therefore the condominium defendants are entitled to summary judgment dismissing plaintiffs' breach of contract claim based on allowing Rao and Raj to keep Ibiza in the condominium before the attack.

Once Ibiza attacked Johnson, however, the condominium defendants were aware that Ibiza was a nuisance and health hazard. Therefore they have failed to establish that they did not breach the first sentence of ¶ 12 by allowing Rao and Raj to keep a dog that was a nuisance and health hazard or that

plaintiffs did not suffer any compensable injury from such an attack.

VII. PLAINTIFFS' REMAINING CLAIMS

The condominium defendants also move for summary judgment dismissing plaintiffs' claims for punitive damages. Plaintiffs seek punitive damages from the condominium defendants for their strict liability, negligence, and negligent infliction of emotional distress, but not for their breach of the condominium rules or by-laws. Since the court dismisses plaintiffs' claims seeking punitive damages, and there is no independent cause of action for punitive damages under New York law, plaintiffs retain no claim for punitive damages. Wholey v. Amgen, Inc., 165 A.D.3d 458, 459 (1st Dep't 2018); Jean v. Chinitz, 163 A.D.3d 497, 497 (1st Dep't 2018); Verdi v. Dinowitz, 161 A.D.3d 413, 414 (1st Dep't 2018).

To the extent that plaintiffs raise a claim under New York Agriculture and Markets Law § 123(10) in opposition to defendants' motions, since plaintiffs failed to plead this claim in their complaint or to amend their complaint to include the claim, the court may not consider this claim. Plaintiffs may not recover medical expenses for Alan Johnson's injuries under this provision in any event, because Ibiza was never declared a dangerous dog under Agriculture and Markets Law § 123(2) and (10).

VIII. DEFENDANTS' CROSS-CLAIMS

The court denies Rao's and Raj's motion for summary judgment dismissing the condominium defendants' cross-claims for contribution and non-contractual, implied indemnification, as Rao and Raj fail to establish that they are not strictly liable for their dog Ibiza's attack on Johnson. Essex St. Corp. v. Tower Ins. Co. of N.Y., 153 A.D.3d 1190, 1197 (1st Dep't 2017); McCullough v. One Bryant Park, 132 A.D.3d 491, 493 (1st Dep't 2015); DeJesus v. 888 Seventh Ave. LLC, 114 A.D.3d (1st Dep't 2014); Betancur v. Lincoln Ctr. for the Performing Arts, Inc., 101 A.D.3d 429, 430 (1st Dep't 2012). The condominium defendants have stipulated to discontinue their contractual indemnification cross-claim against Rao and Raj, so that Rao's and Raj's motion for summary judgment dismissing this cross-claim is moot. Rao and Raj are entitled to summary judgment dismissing the condominium defendants' cross-claim for breach of a contract to procure insurance because the condominium's rules require unit owners only to maintain insurance policies, not to name the condominium defendants as insureds under those policies. Nicolini Aff. Ex. E, at 29-30.

The condominium defendants are entitled to summary judgment dismissing Rao's and Raj's cross-claims for implied indemnification and for contribution based on the condominium defendants' negligence because the condominium defendants have established their entitlement to dismissal of plaintiffs' claims for strict liability, negligence, and negligent infliction of

emotional distress. Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549 (1st Dep't 2018); Rubino v. 330 Madison Co., LLC, 150 A.D.3d 603, 604 (1st Dep't 2017); Wilk v. Columbia Univ., 150 A.D.3d 502, 503-504 (1st Dep't 2017); Scekic v. SL Green Realty Corp., 132 A.D.3d 563, 565-66 (1st Dep't 2015). Moreover, since plaintiffs' claims for strict liability and negligence against the condominium defendants stem from the attack by Rao's and Raj's dog on Johnson, under no circumstances would the condominium defendants be at fault for the dog's attack when Rao and Raj were not, as required for implied indemnification.

IX. CONCLUSION

For all the reasons explained above, the court grants defendants Rao's and Raj's motion for summary judgment dismissing plaintiffs' claims for negligence and negligent infliction of emotional distress, but denies these defendants' motion for summary judgment dismissing plaintiffs' claim for strict liability. C.P.L.R. § 3212(b) and (e). The court also grants defendants Rao's and Raj's motion for summary judgment dismissing co-defendants' cross-claim for breach of contract, but otherwise denies dismissal of the cross-claims. C.P.L.R. § 3212(b).

The court grants defendants Element Condominium's and Douglas Elliman Property Management's motion for summary judgment dismissing plaintiffs' claims for strict liability, to the extent alleged; negligence; negligent infliction of emotional distress; and breach of contract to the extent that this claim is based on the condominium defendants' conduct before May 30, 2011.

C.P.L.R. § 3212(b) and (e). The court denies these defendants' motion for summary judgment dismissing plaintiffs' claim for breach of contract to the extent that the claim is based on the condominium defendants' conduct after May 30, 2011. Id. The court also grants these defendants' motion for summary judgment dismissing co-defendants' cross-claims. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: October 31, 2019

LUCY BILLINGS, J.S.C.