

Mulji v Gordon
2020 NY Slip Op 34326(U)
December 29, 2020
Supreme Court, New York County
Docket Number: 152757/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM*Justice*

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INDEX NO. 152757/2019

AMISHA MULJI,

Plaintiff,

MOTION DATE N/A, N/A

- V -

MINDY GORDON, MELISSA TORRES, JOHN DOES

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 20, 22, 23, 25

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 16, 17, 18, 19, 21, 24, 26

were read on this motion to/for DISCOVERY.

The following facts are not disputed. Defendant is the owner of a dog named Mystery.

On September 30, 2018, plaintiff was walking her dog named CJ around 8:45 in the evening.

Mystery was also out and being handled by Melissa Torres. Mystery was leashed but was not muzzled. Mystery then attacked plaintiff and CJ, scratching plaintiff and biting CJ. Eventually, CJ died from its injuries. As a result of this incident, the New York City Department of Health and defendant have entered into a settlement setting forth the care and responsibilities of Mystery. The settlement states, in relevant part “Mystery was involved in both the foregoing incident and a prior incident on December 11, 2015, in which Mystery attacked and caused physical injuries to persons and killed another dog.” Plaintiff brought this action against Gordon (under a strict liability theory) and Torres (under a negligence theory) seeking damages relating to the incident. In Motion Sequence 001 plaintiff moved for partial summary judgment against

defendants. In Motion Sequence 2, plaintiff moved for discovery sanctions based upon Gordon's alleged failure to respond to discovery demands. Defendant Torres has not filed an answer.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). This burden is a heavy one, and all facts must be viewed in a light most favorable to the non-moving party *Jennack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]; (*Rodriguez v. Parkchester South Condominium Inc.*, 178 AD2d 231 [1st Dept 1991]). The moving party must establish a *prima facie* case showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The proponent of a summary judgment motion makes a *prima facie* showing, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once the moving party has demonstrated its *prima facie* showing, the burden then shifts to the non-moving party to demonstrate by admissible evidence the existence of a triable issue of fact necessitating a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

In order to recover in strict liability in tort for damages caused by a dog bite, a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known about said dog's vicious propensities (See *Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Bard v Jahnke*, 6 NY3d 592, 596 [2006]; *Collier v Zambito*, 1 NY3d 444, 446 [2004]). Evidence tending to demonstrate a dog's vicious propensities includes evidence of a prior attack, the dog's tendency to growl or 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 (*Ioveno v Schwartz*, 139 AD3d 1012, 1012 [2nd Dept 2016], citing *Bard v Jahnke*, 6 NY3d 592, 597 [2006]; *Collier v Zambito*, 1 NY3d 444, 446-447 [2004]).

Here, there is no question of fact about Mystery's vicious propensities and defendant Gordon's knowledge of it. First, none of the facts alleged in plaintiff's statement of facts are contradicted by defendant other than a general statement that Mystery is not vicious and did not "attack" Amisha Mulji. Notably, plaintiff does not dispute any of the alleged prior incidents (both in 2015), that Mystery and Mulji were involved in an incident, that Mystery was not muzzled and the allegations that Mystery bit CJ, embedded his teeth in CJ and shook CJ like a rag doll.

In addition, the stipulation signed by Mindy Gordon explicitly acknowledges both this incident and a prior incident. Even assuming that Mystery has complied with the stipulation following this incident, that does not relieve Mindy Gordon of liability. Hence, defendant Gordon has had knowledge of prior incidents, admitted to this incident and is thus, liable for this incident and partial summary judgment on the issue of liability against Mindy Gordon is granted.

Motion Sequence 002 seeks discovery sanctions against Gordon. A review of the sought-after discovery reveals that the information sought, and allegedly not responded, is information related to liability and damages. As summary judgment on liability is granted above, the discovery related to liability is now academic. Accordingly, Motion Sequence 002 is denied without prejudice as academic. However, the motion for partial summary judgment was brought against defendants. As issue has not been joined against Melissa Torres, summary judgment under CPLR 3212(a) is not permitted. Accordingly, it is therefore

ORDERED that partial summary judgment against Mindy Gordon for liability is granted; and it is further

ORDERED that Motion Sequence 002 for discovery sanctions is denied without prejudice; and it is further

ORDERED upon completion of discovery on damages, that plaintiff may file a note of issue and statement of readiness with the Clerk and pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial on damages as against defendant Mindy Gordon; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the motion for summary judgment against defendant Melissa Torres is denied.

12/29/2020

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

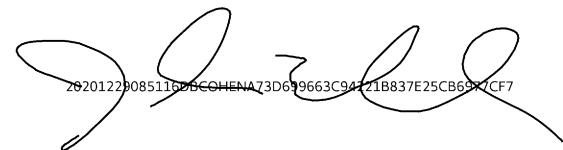
GRANTED IN PART

OTHER

SUBMIT ORDER

REFERENCE

FIDUCIARY APPOINTMENT



20201229085115DCOHEN/73D699663C94721B837E25CB6947CF7

DAVID BENJAMIN COHEN, J.S.C.