Short Form Order

Index No. 609314/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

P R E S E N T:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER
CASEDISP

_____x
KATHLEEN PIEDIMONTE AND FRANK PIEDIMONTE, INDIVIDUALLY, AND AS HUSBAND AND WIFE,

Plaintiffs,

-against-

INEZ A. ALVARENGA-BENITEZ,

Defendant.
_____x

Mot. Seq. No.: 001 - MD
Orig. Return Date: 04/28/2020
Mot. Submit Date: 08/04/2020

Mot. Seq. No.: 002 - MG
Orig. Return Date: 07/07/2020
Mot. Submit Date: 08/04/2020

**PLAINITFFS' ATTORNEY**
Cellino & Barnes
532 Broadhollow Road, Suite 107
Melville, NY 11747

**DEFENDANT'S ATTORNEY**
Laura Alto, Esq.
Devitt, Spellman & Barrett LLP
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Upon the e-filed documents numbered 9 through 32 and 34 through 39; it is

***ORDERED*** that the plaintiffs' motion (#001) for an order granting partial summary judgment in their favor on the issue of liability is denied; and it is further

***ORDERED*** that the defendant's cross motion (#002) for an order granting summary judgment dismissing the plaintiffs' complaint in its entirety is granted.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff Kathleen Piedimonte as a result of having the leg of her jeans bitten and the back of her leg pressed upon or impacted by the paws of the defendant's twelve and a half pound chihuahua named Perry, causing her to fall and break her leg. The plaintiff's husband Frank Piedimonte also asserts a derivative claim.

The plaintiffs' neighbor, Danielle Jones, testified at her deposition that prior to the incident, the defendant's dog Perry had wandered in the street unattended every day, that he routinely growled and barked at people walking down the street, that she had seen Perry charge at people or cars more than ten times, and that, on one occasion, Perry had come up behind her when she was weeding and growled, barked, and showed his teeth from two or three feet away.

On that occasion, Ms. Jones testified that she stood up and told the dog to go home. The plaintiffs' neighbor Reginald Jones, husband of Danielle, testified at his deposition that, prior to the incident, he had witnessed an unattended Perry growling at his wife, and that Perry routinely growled and showed his teeth at him while he was mowing the lawn. The plaintiff Frank Piedimonte testified that, prior to the incident, he saw Perry in the street every day chasing people and cars, that he saw him nip his wife's jeans once, and that he saw him nip at an elderly neighbor, though he did not make any contact. Mr. Jones also testified that, aside from the incidents with his wife, he was not aware of other incidents where Perry had bared his teeth or physically hurt anyone. Mr. Jones further testified that he repeatedly asked the defendant's wife to keep Perry inside because he kept running under cars.

At her deposition, Mrs. Piedimonte testified that, prior to the incident, she had led Perry to his home without making physical contact approximately twenty times due to her concern for his safety. During those times, Mrs. Piedimonte testified that Perry had not been aggressive toward her until one month prior to the incident at issue, at which time he nipped the leg of her jeans, though the fabric was not damaged due to his "little teeth." Mrs. Piedimonte further testified that Perry chased children and routinely nipped at her elderly neighbors who would shove him away, although she also testified that she had never seen him bare his teeth at any time other than the incident at issue and the occasion when he nipped her pant leg one month prior. When the incident occurred, Mrs. Piedimonte testified that Perry ran at her and nipped the back of her pants leg approximately three times, that she felt the pressure of his paws on the back of her leg, and that she lost her balance and fell, causing her to break her leg.

At his deposition, the defendant testified that he has owned Perry since March 2015, that Perry was small, and that he did not believe him to be aggressive. The defendant further testified that he knew that Perry sometimes got out of the house, but he did not believe that it happened often. At the time of the incident, the defendant testified that he generally worked from 7:00 a.m. to 5:30 p.m., during which time his wife and children looked after Perry, and that they informed him that Perry would sometimes get loose and run around the neighborhood.

In addition to deposition transcripts, in support of their motion, the plaintiffs submit a copy of a Vetco vaccination certificate for Perry, dated May 24, 2016. There is no affidavit by the veterinarian. On the vaccination certificate is a notation which states, "unable to examine *caution*." The defendant's counsel claims that the Vetco record is incomplete, but does not annex a complete copy, and notes that Perry did receive his vaccination that day, as indicated on the certificate. The defendant's counsel also points out that Perry previously had a vaccination reaction, as indicated by a check box on the certificate, suggesting that the cautionary notation may refer to the prior reaction. The defendant testified that he had taken Perry to Vetco (Petco) approximately five times for vaccinations. The plaintiffs also submit an opinion of an expert dog trainer, Asa W. Anderson ("Anderson") dated January 27, 2020. Anderson reviewed deposition transcripts, vaccination certificates and incident reports, some of which are submitted with the plaintiffs' motion, some of which are not. It is Anderson's opinion that the defendant knew or should have known that Perry was a "dangerous dog that possessed unsafe characteristics" and that he "violated the standard of care for a reasonable dangerous dog owner." The defendant

argues that Anderson's report is rife with factual inaccuracies and that its conclusions are predicated upon a negligence theory which is not the New York legal standard.

The defendant's counsel acknowledges that Perry routinely roamed the neighborhood but asserts that he was not aggressive. Counsel cites deposition testimony by the plaintiff with respect to her returning Perry to his home on numerous occasions. In that context, the plaintiff stated that she had not seen any sign of aggression when returning him home. However, the plaintiff also testified that, on one occasion approximately a month prior to the incident, Perry had nipped her pants leg when she returned him home, and that she was fearful of him afterwards. Counsel cites deposition testimony of Mr. Piedimonte, Ms. Jones, who is a veterinary technician, and Mr. Jones in support of the proposition that no one had expressed fear of Perry prior to the incident, rather they feared for the dog's safety. Counsel further cites deposition testimony in support of the proposition that Perry was frequently roaming the neighborhood without any actual aggressive incident. The defendant's counsel also expresses skepticism that Perry, a twelve and a half pound chihuahua, could have caused the plaintiff's fall, as she was 5'4" tall and 180 pounds, in the manner alleged.

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). The opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Stonehill Capital Mgmt., LLC v Bank of the West***, 28 NY3d 439, 448, 68 NE3d 683, 688 [2016](quoting ***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, 501 NE2d 572). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

"To recover in strict liability in tort for damages caused by a dog, a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities" (***Ioveno v. Schwartz***, 139 AD3d 1012, 1012–13, 32 NYS3d 297, 298–99 [2d Dept. 2016]; ***I. A. v. Mejia***, 174 AD3d 770, 771, 105 NYS3d 103, 105 [2d Dept. 2019]). The sole means of recovery for damages is to produce evidence sufficient to establish strict liability; no recovery is available for ordinary negligence (***Bukhtiyarova v. Cohen***, 172 AD3d 1153, 102 NYS3d 57 [2d Dept. 2019]; ***King v. Hoffman***, 178 AD3d 906, 114 NYS3d 467 [2d Dept. 2019]; ***Petrone***, *supra;* ***Ostrovsky v. Stern***, 130 AD3d 596, 13 NYS3d 462 [2d Dept. 2015]). An owner of a domestic animal who knows or should have known of its vicious

propensities will be liable for damage caused by the animal's exercise of such propensities (***Collier v Zambito***, 1 NY3d 444, 807 NE2d 254 [2004]; ***Hai v. Psoras***, 166 AD3d 732, 87 NYS3d 239 [2d Dept 2018]; ***Costanza v Scarlata***, 188 AD3d 1145, 132 NYS3d 844, [2d Dept. 2020]; ***Petrone v Fernandez***, 12 NY3d 546, 910 NE2d 993 [2009]; ***Drakes v Bakshi***, 175 AD3d 465, 104 NYS3d 701 [2d Dept 2019]). "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***, *supra, quoting* ***Dickson v McCoy***, 39 NY 400, 403 [1868]; *see also* ***Bukhtiyarova v Cohen***, 172 AD3d 1153, 102 NYS3d 57 [2d Dept. 2019]; ***King v Hoffman***, 178 AD3d 906, 114 NYS3d 467 [2d Dept. 2019]; ***Drakes***, *supra;* ***Lina Thai Wong v Largana***, 170 AD3d 700, 93 NYS3d 597, (Mem) [2d Dept. 2019]). Evidence of a dog's vicious propensities may be proof of a prior attack; a tendency to growl, snap or bare its teeth; a habit of acting in ways that risk harm to others; the fact of being kept as a guard dog or the occasions and manner in which the animal is restrained (***Collier***, *supra;* ***Feit v Wehrli***, 67 AD3d 729, 888 NYS2d 214 [2d Dept. 2009]; ***Lina Thai Wong***, *supra;* ***Bukhtiyarova,*** *supra;* ***King*** *supra;* ***Bard v Jahnke***, 6 NY3d 592, 848 NE2d 463 [2006]). "Knowledge of an animal's vicious propensities may also be discerned, by a jury, from the nature and result of the attack" (***I. A. v. Mejia***, 174 AD3d 770, 771, 105 NYS3d 103, 105 [2d Dept. 2019] *quoting* ***Matthew H. v. County of Nassau***, 131 AD3d 135, 148; *see also* ***Hai v Psoras***, 166 AD3d 732, 87 NYS3d 239 [2d Dept 2018]).

Here, the plaintiffs assert that they are entitled to summary judgment because the defendant's dog exhibited vicious tendencies prior to the incident here at issue. Such tendencies are described as: routinely wandering the neighborhood and running in the street, defecating on neighbor's lawns, chasing children, and on a few occasions, growling with his teeth showing. The plaintiff had returned the dog to his home on numerous occasions. On one such occasion, he nipped at her pant leg. The plaintiff testified that when the defendant's wife and daughter answered the door, she told them to bring the dog in because she did not want to hit it with her car. There is no indication that she mentioned the nip at her pant leg. Approximately one month later, the defendant's dog approached her while she was walking her own dogs and she turned away. She testified that he then came up behind her and nipped at her pant leg at least three times and put his paws on the back of her left leg.

The defendant counters that he had no knowledge of any alleged vicious propensities and that in fact Perry had no vicious propensities. He asserts that the neighbors allege that Perry was frequently in the street and on neighbor's lawns (there is testimony that this occurred daily) but the only description of unwanted physical contact is the nip at the plaintiff's jeans one month prior to the incident (which was not reported to the defendant). There is no testimony from the plaintiffs' elderly neighbors but it is averred by plaintiff Kathleen Piedimonte that they discouraged Perry's advances by shooing at him with a pooper scooper and that he retreated. The defendant further argues that even if he had known about the prior nip to the plaintiff's jeans, such an occurrence would not give the defendant notice of the possibility of the event that occurred. The defendant claims entitlement to judgment as a matter of law based upon a lack of vicious propensity and a lack of actual or constructive notice of any such propensity.

Here, the plaintiffs have failed to make a prima facie case of entitlement to summary

judgment as a matter of law with respect to vicious propensity and knowledge. Perry frequently interacted with neighbors and the evidence presented is insufficient to establish that he acted in such manner that was likely to cause harm. Furthermore, there is insufficient evidence that the plaintiff's injury was the result of a dog's viciousness. Even if it were the case that the plaintiff's injury was the result of negligent supervision of Perry, New York Law imputes a strict liability standard, and it does not recognize an ordinary negligence cause of action with respect to a domestic dog (*see* ***Petrone v Fernandez***, 12 NY3d 546, 550, 910 NE2d 993, 995-96 [2009]). For this reason, Anderson's report is accorded no weight. The plaintiffs have failed to establish that Perry had vicious propensities and that the defendant knew or should have known about such propensities. Furthermore, it is unclear that the plaintiff's injuries resulted from an action constituting the exercise of a vicious propensity. Accordingly, the plaintiffs' motion seeking summary judgment is denied.

The defendant has made a prima facie case that Perry's behaviors were essentially normal canine behaviors and not indicative of vicious propensities, and that he did not know of nor should he have known of Perry's exhibiting any such propensities. Although it is clear that Perry was frequently unsupervised, this fact is insufficient to impute strict liability. Upon presentation of a prima facie case of entitlement to summary judgment as a matter of law, the burden shifted to the plaintiffs to raise a triable issue of fact. The plaintiffs have failed in this burden. As such, the defendant's motion seeking summary judgment dismissing the plaintiffs' complaint is granted.

Accordingly, the plaintiffs' motion is denied, and the defendant's is granted.

ENTER

Date: January 13, 2021
Riverhead, New York

Martha L Luft
HON. MARTHA L. LUFT, A.J.S.C.

___X___ Final Disposition _____ Non-Final Disposition