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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X **PART 6**

JOHN PAUL BASILE,

Plaintiff,

-against-

RICHARD SALKA and KAREN SALKA,

Defendants.

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INDEX NO. 17541/08
XXX
MOTION DATE: 12/13/11
SEQUENCE NO: 002

Notice of Motion, Aff & Exs..... 1
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Upon the foregoing papers, defendants motion for summary judgment on liability grounds, pursuant to CPLR §3212, is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for personal injuries allegedly sustained by the plaintiff when he retreated from the defendants' property after their dog, Harley, passed through a fence and charged toward him. The incident occurred on May 22, 2007 when the plaintiff, who was working as a UPS delivery man, attempted to deliver a package near the defendants' home. The dog did not make contact with the plaintiff, but the plaintiff alleges that he injured his foot on a metal plate on the bottom of the delivery truck when he dove into the driver's side door after running from the defendants' property when the dog started toward him. Defendants Richard Salka and Karen Salka move for summary judgment on liability grounds arguing that there is no evidence which shows that the defendants' dog possessed vicious propensities or that the defendants had knowledge of any such propensities prior to the plaintiff's incident herein.

In support of their motion, the defendants submit their depositions transcripts and the depositions transcripts of the plaintiff and a non-party witness, Edwin Herrara. Plaintiff testified

that prior to the incident herein, he did not remember ever delivering any packages to defendants' residence, and he had never seen the dog, Harley,. On the day of the incident at issue, the dog appeared in the breezeway of the defendants' home, barked at the plaintiff, and then started chasing him. The plaintiff testified that he turned and ran to his truck. By the time he got into the truck and looked back, the male owner of the dog had come out from the backyard and had the dog by its collar. The plaintiff testified that the dog did not make any physical contact with him on the day of the incident, and after the incident happened, the male owner told the plaintiff that he was in the backyard with the dog immediately prior to the incident and that the dog does not bite.

Non-party witness, Edwin Herrara, a co-worker of the plaintiff who is employed as a delivery man for UPS, also testified that he was unaware of any vicious propensities on the part of the defendants' dog prior to the subject incident. Mr. Herrera testified that he had been assigned to the route where the defendants live prior to the plaintiff's incident herein. Mr. Herrera testified that he had never seen the defendants' dog or had any incident involving the defendants' dog prior to May 22, 2007. He further testified that UPS has a computer system that allows a driver to add notes about a particular property on a route for the purpose of warning other driver of what they could encounter when delivering to a particular residence. Mr. Herrara testified that prior to the plaintiff's incident, there were no warnings in the UPS computer system concerning the defendants' property or dog. Additionally, prior to May 22, 2007, Mr. Herrara himself never made any complaints about the defendants' dog to UPS or to the police.

Both of the defendants, Karen Salka and Richard Salka, testified that they were not aware of their dog, Harley, having any vicious propensities. Both defendants testified that the dog had never bitten anyone, that no one, including neighbors or UPS, had ever complained about the dog's barking, and that they had never received any violations or complaints from the City of Glen Cove about the dog. Defendant Karen Salka testified that UPS was constantly delivering packages to her home because she was working from home. She testified that prior to plaintiff's incident herein, she had only heard Harley bark at delivery people. Defendant Karen Salka had also never seen Harley run out of the gate of the breezeway or observed Harley confront any other dog. She further testified they do not place the dogs in the backyard or separate them from

their company when visitors come to their house. Similarly, defendant Richard Salka testified that prior to the plaintiff's incident, Harley had never growled before, even when someone was approaching the house; that Harley never fought with their other dog; that Harley had no issues associating with people outside of their family; and that Harley had never run out of the gate towards any delivery truck, delivery person, or anyone else. Defendant Richard Salka further testified that on the day of the accident, Harley and the defendants' other dog, only ventured to the front of the breezeway, which is located about 30 to 35 feet from the street, before he called out to them and the dogs returned to the backyard.

It is well settled that an owner of a domestic animal will not be held liable for injuries caused by that animal unless it is demonstrated that the owner "either knows or should have known of that animal's vicious propensities...." (*Collier v. Zambito*, 1 N.Y.3d 344, 775 N.Y.S.2d 205 (2004); *Bohm v. Nystrum Constr.*, 208 A.D.2d 668, 617 N.Y.S.2d 420 (2d Dept. 1994)). In the absence of actual or constructive knowledge of a dog's vicious propensities, a dog's owner is not liable when it bites someone. (*Czarnecki v. Welch*, 13 A.D.3d 952, 786 N.Y.S.2d 659 (3d Dept. 2004); *Han v. F & M Enterprise of Corona Corp.*, 293 A.D.2d 572, 740 N.Y.S.2d 227 (2d Dept. 2002); *Butler v. Brischoux*, 244 A.D.2d 444, 664 N.Y.S.2d 128 (2d Dept. 1997)). Such knowledge of a dog's vicious propensities may be established by proof of similar acts of a similar kind of which the owner had notice, that the dog was restrained by its owners in a particular manner, or that the dog showed other threatening or aggressive behavior, such as growling, snapping or baring its teeth. (*See, Collier v. Zambito*, 1 N.Y.3d 344, 775 N.Y.S.2d 205 (2004); *Seybolt v. Wheeler*, 42 A.D.3d 643, 839 N.Y.S.2d 830 (3d Dept. 2007)).

The defendants have established their prima facie entitlement to judgment as a matter of law by establishing that they neither knew nor should have known that their dog had any vicious propensity or any propensity to run after people. (*Cameron v. Harari*, 19 A.D.3d 631, 797 N.Y.S.2d 295 (2d Dept. 2005); *Rodriguez v. Norte*, 40 A.D.3d 1068, 834 N.Y.S.2d 879 (2d Dept. 2007); *See also, Palumbo v. Nikrik*, 59 A.D.3d 691, 874 N.Y.S.2d 222 (2d Dept. 2009)).

In addition, there is no basis for plaintiff's common law negligence claim that the defendants violated the local leash law set forth in the Code of the City of Glen Cove § 87-21, as a violation of a local leash law does not provide a basis for imposing strict liability in a personal

injury action. (*Petrone v. Fernandez*, 12 N.Y.3d 546, 883 N.Y.S.2d 164 (2009); *Curbello v. Walker*, 81 A.D.3d 772, 916 N.Y.S.2d 645 (2d Dept. 2011)(rejecting plaintiff's argument that a common law negligence claim could be made for an alleged violation of the local leash law set forth in the Code of the City of Glen Cove §§87-20, 87-21, and holding that New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal); *Wright v. Fiore*, 77 A.D.3d 821, 908 N.Y.S.2d 882 (2d Dept. 2010)(holding that when harm is caused by a domestic animal, its owner's liability is determined solely by application of the rule articulated in *Collier* — i.e., the rule of strict liability for harm caused by a domestic animal whose owner knows or should have known of the animal's vicious propensities; the plaintiff cannot recover in common law negligence); *Bard v. Janhke*, 6 N.Y.3d 592, 815 N.Y.S.2d 16 (2006)(a cause of action for ordinary negligence does not lie against the owner of the domestic animal which causes injury)).

In opposition, the plaintiff has failed to come forward with any proof in evidentiary form that the defendants' dog had ever previously exhibited any vicious propensities. The plaintiff has not demonstrated that there is any deposition testimony, by any of the witnesses who testified in connection with this incident, that the defendants' dog had vicious propensities that the defendants knew or should have known about prior to the plaintiff's incident. The plaintiff has also not submitted any evidence, in the form of a witness affidavit or otherwise, to substantiate his deposition testimony that he heard stories from co-workers that the defendants' dog came through a window screen and almost popped a door open. A "shadowy semblance of an issue is not enough to defeat a motion [for summary judgment]." (*Ben Strauss Indus., Inc. v. City of New York*, 90 A.D.2d 751, 456 N.Y.S.2d 5 (1st Dept. 1982); *See also, Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 257 N.E.2d 890 (1970) (bald conclusory assertions, even if believable, are not enough to defeat a motion for summary judgment)). The non-party witness, Edwin Herrara testified that he never saw the defendant's dog prior to the incident and never had any incident with the defendants' house or the dog. He also did not know of any individuals, other than the plaintiff, who claimed to have been involved in an incident with defendants' dog. Mr. Herrara's testimony that the dog "looked like he would jump on the door, but you can't really see it because it's the screen door and the other door," is insufficient to

demonstrate that the defendants' dog had vicious propensities. (*See, Roupp v. Condrad*, 287 A.D.2d 937, 731 N.Y.S.2d 545 (3d Dept. 2001)(evidence that the dog would often jump on the fence and bark or grown at people walking by does not demonstrate vicious propensities); *Plennert v. Abel*, 269 A.D.2d 796, 704 N.Y.S.2d 417 (4th Dept. 2000)(holding that summary judgment should have been granted where the defendant's dog barked at times when people traversed the defendants' driveway, but had no history of biting or behaving in a threatening manner toward anyone); *See also, Zelman v. Cosentino*, 22 A.D.3d 486, 803 N.Y.S.2d 652 (2d Dept. 2005); *Elmore v. Wukovits*, 288 A.D.2d 875, 732 N.Y.S.2d 508 (4th Dept. 2001); *Campo v. Holland*, 32 A.D.3d 630, 820 N.Y.S.2d 352 (3d Dept. 2006)).

Absent a showing that the defendants knew or should have known that their dog had vicious propensities, defendants herein cannot be held liable for the injuries allegedly sustained by plaintiff. Accordingly, defendants' motion for summary judgment is granted and the plaintiff's action is hereby dismissed.

Dated: January 19, 2012

Anthony L. Parga, J.S.C.

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