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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

CHRISTIAN-DESTINYLOUIGENE, etc. et ano.,
Plaintiff(s),

- against -

AMBOY BUS INC., et al.,
Defendant(s).

Index
No. 7047 2012

Motion
Date June 30, 2016

Motion
Cal. No. 135

Motion
Seq. No. 4

The following papers numbered 1 to 14 read on this motion by defendants Alynka Jean (Jean) and Kenyon Leggett (Leggett) for an order granting them summary judgment dismissing plaintiffs' (amended) complaint and all cross-claims.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmations - Exhibits.....	5-10
Replies.....	11-14

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action to recover damages for personal injuries alleged to have been sustained by infant plaintiff Christian-Destiny Louigene (plaintiff) on June 27, 2011 at or near the intersection of Craft Avenue and 258th Street in the County of Queens, City and State of New York, when a dog, Reilly – owned by Jean and Leggett – chased her into the street, at which point she was struck by the bus owned by defendant Amboy Bus Inc. (Amboy), and being operated by defendant Yves Lubin (Lubin). Plaintiffs allege in their verified amended complaint, inter alia, that Jean and Leggett were negligent in "causing,

allowing and/or permitting said dog to approach, menace, chase and attack the said infant Plaintiff; and in being otherwise careless, reckless and negligent under all circumstances."

Jean and Leggett now move for summary judgment in their favor on the ground that strict liability – and not negligence – is the only viable theory of recovery and, to that end, neither Jean nor Leggett had any knowledge of any vicious or harmful propensities of their dog and, thus, cannot be held liable for plaintiff's injuries.

Plaintiff testified in relevant part: at the time of the accident, she was seven years old; she was walking back to her grandmother's house with her best friend Jayla, when she stopped at her other friend Layla's house; Layla's house was located on the same block as the home of Jean and Leggett; plaintiff started running around with Layla and approximately four other children, who were Layla's cousins, playing tag in front of Layla's home; that was the first time she had seen the dog, and noticed that he was behind a gate; initially, the dog was just sitting there and not making any noise, but at one point he began to growl at her; one of Layla's cousins then told someone to open the gate at which point he or she opened it and let the dog out; that person was standing inside the gate; she did not know Layla's cousin nor does she know who opened the gate; the dog chased after her and made a growling sound, so she started to run away; the other kids went inside because they were scared of the dog; she was running on the sidewalk; she then ran into the street and saw a bus coming, at which point she was struck by the front of the bus. At no point did the dog actually come into physical contact with her.

Leggett testified, in relevant part: at the time of the incident, he resided with his girlfriend Jean in the Rosedale Condominium Complex; Reilly, a Labrador mix, was his pet dog; he received Reilly as a gift from Jean for Christmas in 2010 from North Shore Animal League, when Reilly was about 10 weeks old; at the time of the incident, Reilly was about 8 months old and approximately 30 pounds; Reilly did not have formal obedience training but he personally taught him commands; he was not aware of any prior incidents where Reilly growled at, or jumped on, bit, or chased anyone; he would sometimes put his paws on his chest to lick; he never witnessed any aggressive behavior, nor was he aggressive around children, nor has he received any complaints relating to the dog; his backyard is enclosed by a gate; the gate had a latch; he was not at home when the incident occurred, but Jean would have been; Reilly had never gotten out of the backyard before this incident.

Jean testified, in relevant part: she adopted Reilly, a Labrador mix – with an unknown other breed – for her boyfriend Leggett; Reilly was about 25-30 pounds and roughly one-and-a-half feet tall; Reilly was trained basic commands; he was also trained to go to the bathroom outside in the backyard; Reilly had never bit nor growled; he barked if he heard noises, was hungry, or if he saw other dogs; he was always collared; he was only leashed when being

taken for a walk; the backyard was enclosed by a four-foot fence; the fence had a door with a metal horseshoe latch; behind the door was a common alleyway for four connected homes; when she got home that day from work, she intended to let Reilly out in the backyard to use the bathroom; she first checked to make sure the gate was closed (she had seen it open once before when her landscapers neglected to close it); she then went inside to put his food out and, when she returned, Reilly was no longer in the backyard; she noticed that the gate was now open; she went to the front door and saw kids running around "normally," saw Reilly walking back toward her front door, and saw the bus driver stop his bus; she was later advised by police officers that Reilly was in some way part of plaintiff's incident, having learned that Reilly came out, plaintiff got scared, and ran into the street; prior to the incident, Reilly had not played with the neighborhood kids but sometimes they would come by the fence just to say "hi" to Reilly; she was not aware of any children having previously opened up the gate to her backyard.

Lubin testified, in relevant part: he was the driver of a big yellow school bus; he was making a left turn onto 258th Street from Craft Avenue at approximately five miles per hour; at that point, he noticed plaintiff, who was visibly frightened, running and being chased by a growling pit bull; she left the sidewalk and then was hit by the bus; approximately two seconds had passed from the time he first saw her and the time the impact occurred.

"Aside from the limited exception set forth in *Hastings v. Sauve*, 21 N.Y.3d 122, 125–126, 967 N.Y.S.2d 658, 989 N.E.2d 940, regarding a farm animal that strays from the place where it is kept (*see Carey v. Schwab*, 122 A.D.3d 1142, 1143–1145, 997 N.Y.S.2d 180), which is not at issue here, 'New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal' (*Egan v. Hom*, 74 A.D.3d 1133, 1134, 905 N.Y.S.2d 624; *see Hastings v. Sauve*, 21 N.Y.3d at 125–126, 967 N.Y.S.2d 658, 989 N.E.2d 940; *Petrone v. Fernandez*, 12 N.Y.3d 546, 550, 883 N.Y.S.2d 164, 910 N.E.2d 993)" (*Bueno v Seecharan*, 136 AD3d 702 [2016]; *see Lew v Stratigakis*, 135 AD3d 832 [2016]; *Cosgrove v Trump Natl. Golf Club*, 134 AD3d 882 [2015]; *Ostrovsky v Stern*, 130 AD3d 596 [2015]).

As such, in order to recover upon a theory of strict liability from a dog bite or attack, a plaintiff must show that the dog had vicious propensities and that the owner of said dog either knew or should have known of such propensities (*see Bueno*, 136 AD3d at 702; *see also Collier v Zambito*, 1 NY3d 444 [2004]; *Lew*, 135 AD3d at 832-33). Vicious propensities include a prior attack, a dog's tendency to growl, snap, or bear its teeth, the way in which the dog is restrained, and a proclivity to act in such a way that puts others at risk of harm (*see Bueno*, 136 AD3d at 703; *Lew*, 135 AD3d at 833). Further, knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the owner had notice (*see Collier*, 1 NY3d at 446; *Jacobsen v Schwarz*, 50 AD3d 964 [2008]).

Here, Jean and Leggett have met their prima facie burden of establishing their entitlement to judgment as a matter of law by demonstrating, by virtue of their respective deposition testimonies, that Reilly had never before exhibited any aggressive behaviors prior to this incident (*see Bueno*, 136 AD3d at 703; *Cosgrove*, 134 AD3d at 883; *Coffey v McAleer*, 112 AD3d 907 [2013]).

In opposition to the motion, both plaintiffs and codefendants Amboy and Lubin have failed to raise a triable issue of fact. While the Court of Appeals in *Hastings* (21 NY3d at 126) left the issue open as to whether an action for negligence can lie against the owner of a dog who allows it to stray from the property on which it is kept, well-established Second Department precedent since the *Hastings* case prevents plaintiffs from relying upon negligence as a basis for liability (*see Bueno*, 136 AD3d at 702; *Lew*, 135 AD3d at 832; *Cosgrove*, 134 AD3d at 882; *Ostrovsky*, 130 AD3d at 596; *Vallejo v Ebert*, 120 AD3d 797 [2014]). It should be noted, the averment that Jean must have been the person who intentionally opened the gate (or that there is an issue of fact in that regard) is based upon pure speculation and would not have otherwise raised a triable issue of fact.

To the extent plaintiffs rely upon an alleged violation of a local leash ordinance (24 RCNY 161.05 [a]) which provides that "a person who owns, possesses or controls a dog shall not permit it to be in any public place or in any open or unfenced area abutting on a public place unless the dog is effectively restrained by a leash or other restraint not more than six feet long," same is not applicable, as Reilly was not in a public place, open area, or unfenced area at the time Jean let him out in her backyard. Assuming, arguendo, one could classify defendants' own fenced-in backyard as an open area simply because the fence contained an unlocked gate, any "violation of the local leash law is 'irrelevant because such a violation is only some evidence of negligence, and negligence is no longer a basis for imposing liability' after *Collier* and *Bard [v Jahnke*, 6 NY3d 592 [2006]" (*Petrone v Fernandez*, 12 NY3d 546 [2009], quoting *Alia v Fiorina*, 39 AD3d 1068 [2007]).

To the extent Amboy and Lubin contend that Jean and Leggett have both failed to offer evidence on their motion as to Reilly's breed and have "conveniently" characterized Reilly as a "Labrador mix" rather than a pit bull (or part pit bull), the latter of which has a "well known reputation as a vicious and unpredictable animal," New York courts have "never . . . held that particular breeds or kinds of domestic animals are dangerous, and therefore when an individual animal of the breed or kind causes harm, its owner is charged with knowledge of vicious propensities" (*Bard*, 6 NY3d at 599). Thus, whether Reilly may have been a pit bull or part pit bull is not a basis for denying summary judgment.

It should be noted that the court is not holding that Reilly having growled at plaintiff while behind the fence prior to the incident cannot, as a matter of law, be considered as prior

knowledge of a vicious propensity by the person opening the gate just prior to opening it. Rather, on this record, there is no evidence that defendants knew or should have known of such a propensity even if the growling were characterized as such. As noted above, there is no evidence to suggest that Jean was the person who purposefully let Reilly out of the backyard[1] or that some other person who had a connection to moving defendants or otherwise had control over their property or over Reilly did so.

Accordingly, the motion by Jean and Leggett is granted. The amended complaint and any cross-claims against them are dismissed.

Dated: July 11, 2016

J.S.C.

1. Jean testified that she was inside preparing Reilly's food, and there is no testimony to contradict that testimony.