To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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THOMAS CINGUINA,

Plaintiff,

-against-

GAYLE BERG,

Defendant.

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DECISION and ORDER
Motion Sequence No. 1
Index No. 59278/2018

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant for summary judgment dismissing the complaint:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - F	1
Affirmation in Opposition	2
Reply Affirmation	3

This is an action for personal injuries allegedly sustained by plaintiff Thomas Cinguina on April 3, 2017, when he was bitten by defendant's dog while delivering a package to defendant in the course of his employment as a United Parcel Service ("UPS") delivery driver, and when he then fell while trying to get away from the dog. Plaintiff's complaint alleges strict liability and negligence or reckless disregard.

In moving for summary judgment, defendant submits the deposition testimony of plaintiff, herself and her husband. She particularly relies on the portions of plaintiff's testimony in which he stated that at the time of the incident, defendant's dog was tied to a five foot leash on

the porch – which he first noticed as he was placing defendant's package on her porch – and that he had not had any problem previously in delivering packages to defendant's house during the more than three years that he drove that route (*see* Plaintiff's EBT, at 36). Defendant also submits her own, and her husband's, testimony that the dog had never bitten anyone, or behaved aggressively, prior to the incident. Defendant also testified regarding hearsay statements that she said were made about plaintiff by plaintiff's manager, who came to defendant's house to complete an incident report. Finally, counsel characterizes the dog bite as a "scratch" on plaintiff's calf that could have resulted from his fall.

In opposition, plaintiff points to other portions of his own deposition testimony, in which he testified that prior to the subject incident, there had been past instances in which he had confrontations with the dog, and the owner had agreed with plaintiff to keep the dog indoors (*see* Plaintiff's EBT, p. 56-57). He elaborated that on previous occasions when he had encountered defendant while she was walking the dog,

> "She had to restrain the dog on a leash when she was walking it with all her might and the dog literally dragged her and if that dog was not on a leash, it probably would have bit me. She had a – she had a very hard time holding the dog back on the leash multiple times and when I -- and then when I saw her without the dog after those incidents, I said, Gayle, please, if I'm making a delivery on your property, please keep the dog inside."

He argues that because UPS package deliveries can be tracked online, defendant knew or should have known when her package was going to be delivered, and kept the dog inside.

Analysis

The applicable legal standard is the rule enunciated in *Collier v Zambito* (1 NY3d 444 [2004]), and re-affirmed thereafter:

> "[W]hen 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" (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009], quoting *Bard v Jahnke*, 6 NY3d 592, 599 [2006], citing Collier v Zambito, 1 NY3d at 446-447).

"[N]egligence is no longer a basis for imposing liability after *Collier* and *Bard*" (*Petrone v Fernandez*, 12 NY3d at 550, quoting *Alia v Fiorina*, 39 AD3d 1068, 1069 [3d Dept 2007]).

Defendant argues that there is insufficient evidence that her dog has "vicious propensities," arguing that plaintiff did not testify that the dog exhibited vicious behavior such as growling or showing its teeth. Notably, however, the term "vicious propensities" does not require that the animal be vicious. The term includes the "propensity to do *any act* that might endanger the safety of the persons and property of others in a given situation" (*Collier*, 1 NY3d at 446, quoting *Dickson v McCoy*, 39 NY 400, 403 [1868]). "[A]n animal that behaves in a manner that would not necessarily be considered dangerous or ferocious, but nevertheless reflects a proclivity to act in a way that puts others at risk of harm, can be found to have vicious propensities – albeit only when such proclivity results in the injury giving rise to the lawsuit" (*Collier*, 1 NY3d at 447). "Indeed, '[a] known tendency to attack others, even in playfulness, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant liable for damages resulting from such an act'" (*Gammon v Curley*, 147 AD3d 727, 728 [2d Dept 2017]), quoting *Anderson v Carduner*, 279 AD2d 369, 369-370 [1st Dept 2001] [internal quotation marks omitted]).

In *Anderson v Carduner*, the First Department reversed the motion court's grant of summary judgment in favor of the defendant dog owner where "the dog . . . allegedly injured the

plaintiff by poking its snout in her eye while standing up on its hind-legs," explaining that the owner had admitted knowledge of the dog's "tendency to 'rise up' to 'greet' people" (279 AD2d at 369). In contrast, in *Gammon v Curley* (147 AD3d at 728), where the plaintiff alleged that she was knocked to the ground when the defendants' dog ran at her, jumped up on its hind legs, and made contact with the upper part of her chest, the defendants' summary judgment motion was granted because the dog had no history of any such conduct previously.

Here, there is evidence that defendant's dog, regardless of whether it was well-behaved generally, had shown a propensity to lunge violently at plaintiff in particular, and that defendant was aware of that propensity. Accordingly, questions of fact are present as to the existence and defendant's awareness of such a propensity, and as to whether plaintiff was caused injury as a result of that tendency.

In view of the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint is denied, and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part on a date of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 8, 2020

HON. TERRY JANE RUDERMAN, J.S.C.