

**Maxwell v A-1 Nassau, Inc.**

2021 NY Slip Op 32979(U)

August 23, 2021

Supreme Court, Nassau County

Docket Number: Index No. 608912/2018

Judge: David J. Gugerty

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID J. GUGERTY, J.S.C.

-----X TRIAL/IAS PART 24

JUNIOR MAXWELL,

Plaintiff,

Index No. 608912/2018

Mot. Seqs. 07, 08, & 09

Submit Date 3/17/21

-against-

A-1 NASSAU, INC. d/b/a NASSAU AUTO BODY
& TOWING, AAAA NASSAU INC. d/b/a NASSAU
AUTO BODY & TOWING, CHELSEA REAL
PROPERTIES II LLC and 121 BEDELL STREET
PROPERTIES, LLC,

Defendants.

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The following papers were read on this motion:

NYSCEF Numbered

Table listing papers read on motion and their corresponding NYSCEF page numbers, including Notice of Motion, Affirmation, and Exhibits (145-153), Notice of Cross Motion, Affirmations, and Exhibits (158-163), etc.

Defendant, 121 Bedell Street Properties, LLC, moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it (Sequence No. 7) is determined as provided herein.

Defendant, Chelsea Real Properties II LLC, cross moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it (Sequence No. 8) is determined as provided herein.

Plaintiff moves for an order pursuant to CPLR 3124 directing the defendant AAAA Nassau Inc. d/b/a Nassau Auto Body & Towing to produce certain evidence by a date certain and adjourning the defendant's deposition until that evidence is produced (Sequence No. 9) and for costs is determined as provided herein.

The plaintiff in this case seeks to recover damages for personal injuries he allegedly sustained when he was attacked by a dog on October 12, 2017 in the vicinity of 200 N. Franklin Street in Hempstead. Two defendants which own properties at or near the scene of the attack, more specifically, 121 Bedell Street Properties, LLC and Chelsea Real Properties II LLC which is located at 127 Bedell Street, seek summary judgment dismissing the complaint as well as any and all cross-claims against them on the grounds that there is no evidence that the subject attack occurred on their properties; that they did not own the dog or know it was being harbored on their properties; and, assuming, arguendo, that they knew or should have known that the dog was being harbored on their properties, they had no notice that he had any vicious propensities.

The facts pertinent to the determination of these motions are as follows:

Exactly where the plaintiff was attacked is unclear, but it is not disputed and is portrayed in a video of the subject attack that the plaintiff was attacked *near* a Nassau County impound lot where vehicles impounded by the various municipalities and police departments are towed and stored. That impound lot is located directly behind the defendant 121 Bedell Street Properties' premises and to the side rear of the defendant, Chelsea Real Properties', premises. The defendant AAAA Nassau Inc. was a month-to-month tenant at Chelsea Real Properties.

The plaintiff had worked in the subject area moving cars for Mazda five to seven days a week for two years prior to his attack. He used a parking lot adjacent to Bedell Street and as a result, transversed Bedell Street on foot whenever he worked. The plaintiff testified at his examination-before-trial that he saw the dog that attacked him in front of the garages at 121 Bedell Street and Chelsea Real Properties every day he worked and that he observed the dog going in and out of their garages as well. He also testified that the dog was always on a leash which was held by either a man or woman who looked to be of Hispanic descent. He testified that the man worked in the beige colored auto body shop based on observing him work on cars in front of that building. He additionally testified that he never observed the dog unleashed nor did he see the dog ever act ferociously before he was attacked. However, he also testified that he did hear him bark and saw him growl but did not know what caused him to do so. He described the dog as a "very serious dog" and testified that he never went close to him.

The plaintiff testified that he did not see the man in front of the auto body shop in the morning the day of his attack. He was attacked that afternoon when he returned to the area. The plaintiff testified that he did not know exactly where the dog came from and that the dog was not leashed and ran toward him barking. He hit the dog with a box of keys he was carrying to try to ward him off of him. The plaintiff testified that after he was able to stand up, a man who looked to be of Hispanic descent approached whom he was unable to recognize and put the dog on a leash and told him to come into the auto body shop. At the same time, an eyewitness female was calling from her car parked nearby some six feet away to come to her and he did so. He got in

her car and she called 911. The plaintiff did not know what the man who restrained the dog did or where he and the dog went after restraining the dog.

Both a description of the alleged video<sup>1</sup> of the incident and the testimony of the eyewitness who worked nearby and was having lunch in her car in a nearby parking lot show the dog running from the impound lot to the walkway where he knocked the plaintiff down and attacked him. Not only do we have the plaintiff's account of this, but the aforementioned eyewitness testified at her examination-before-trial in detail how she watched the dog knock the plaintiff down and attack many parts of his body while the plaintiff attempted to ward him off by striking him with a box he had been carrying. The eyewitness testified that during the attack, a man who appeared to be of Hispanic descent came from the impound lot, captured the dog at his neck with a slip knot noose and dragged the dog away. The eyewitness testified that at the time of this incident, she was parked in her assigned spot where she customarily parked each work day and that she had not observed the dog or heard a dog barking aggressively at this location for the eight months prior to this incident. That man's identity and the dog's owner remain unidentified.

In support of its motion, the defendant, 121 Bedell Properties, has submitted the affidavit of its President Kerry Thomas who attests that she has never owned a dog, let alone one with the characteristics described by the plaintiff. Nor have any of her employees had dogs at her premises. In fact, she had no knowledge of any dog being kept on the subject property. 121 Bedell Street has never kept, maintained nor raised any dogs at its property. Thomas attests that at the time of the plaintiff's attack, 121 Bedell's property was unoccupied and used only to store vintage cars.

In support of its motion, the defendant, Chelsea Real Properties, has submitted the affidavit of its property manager, Peter Andromidas. He attests that the subject property was leased by the defendant, AAAA Nassau Inc. d/b/a Nassau Auto Body & Towing, at the time of the plaintiff's attack. As the property manager, he typically visited the property once a month to check on things. He attests that he has not ever owned a dog or harbored one at the subject premises matching the description given by the witnesses nor has anyone else affiliated with Chelsea Real Properties. He similarly attests that he is unaware of anyone from AAAA Nassau Inc. d/b/a Nassau Auto Body & Towing ever owning or keeping any dog at the premises, let alone one with vicious propensities. He also notes that the dog came from the impound lot on to the walkway before attacking the plaintiff, not from his property.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). A party seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v*

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<sup>1</sup> The video has not been produced. The only issue disputed is precisely where the dog came from and that issue is irrelevant in making the subject determinations.

*Gervasio*, 81 NY2d 923 [1993]). If the movant makes a prima facie showing, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hospital*, supra at 324). “[T]o defeat a motion for summary judgment the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ ” (*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067–1068 [1979], quoting CPLR 3212, subd. [b]). “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

“‘[T]he owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities (emphasis added)’ ” (*Doerr v Goldsmith*, 25 NY3d 1114, 1121 [2015], quoting *Collier v Zambito*, 1 NY3d 444, 446 [2004]). “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” (*Bard v Jahnke*, 6 NY3d 592, 596–597 [2006] [internal quotation marks omitted]). “Evidence tending to prove that a dog has vicious propensities includes a prior attack, the dog's tendency to growl, snap, or bare its teeth, the manner in which the dog was restrained, and a proclivity to act in a way that puts others at risk of harm” (*Hodgson–Romain v Hunter*, 72 AD3d 741, 741 [2d Dept 2014], citing *Bard v Jahnke*, 6 NY3d at 597; *Velez v Andrejka*, 126 AD3d 685, 686 [2d Dept 2015]; see also, *Costanza v Scarlata*, 188 AD3d 1145, 1146 [2d Dept 2020]). “Strict liability can also be imposed against a person *other than the owner of an animal* which causes injury if that person harbors or keeps the animal with knowledge of its vicious propensity (emphasis added)” (*Matthew H. v County of Nassau*, 131 AD3d 135, 144 [2d Dept 2015], citing *Quilty v Battie*, 135 NY 201, 203–204 [1892]; *Champ–Doran v Lewis*, 69 AD3d 1101, 1102–1103 [3d Dept 2010]; *Dufour v Brown*, 66 AD3d 1217, 1218 [3d Dept 2009]; see also *Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 164 [1985]; *Hall v United Founders, Ltd.*, 112 AD3d 530 [1<sup>st</sup> Dept 2013]).

“[N]o liability can be found against a defendant who neither owned, harbored, nor exercised dominion and control over the animal, and did not permit it to be on or in his or her premises” (*Matthew H. v County of Nassau*, 131 AD3d at 144, citing *Rodriguez v Messenger*, 108 AD2d 1085, 1085 [4<sup>th</sup> Dept 2013], rearg den 109 AD2d1222 [4<sup>th</sup> Dept 20113]; *Nidzyn v Stevens*, 148 AD2d 592, 593 [2d Dept 1989]; *Arslanoglou v Defayette*, 105 AD2d 973, 974 [3d Dept 2014], app denied, 64 NY2d 608 [1985]; see also, *Myers v Lobman*, 61 Misc 3d 1202(A) [Sup Ct 2018 Suffolk County] quoting *Powell v Wohlleben*, 256 AD2d 396 [2d Dept 1998] and *Matthew H. v County of Nassau*, 131 AD3d at 144). “ ‘Although the term “harboring” lacks a clear singular definition, one harbors a dog by ‘making it part of his or her household, even if he or she does not assume control over the animal’ ” (*Myers v Lobman*, 61 Misc 3d 1202(A) at \*3, quoting *Matthew H. v County of Nassau*, 131 AD3d at 145; citing Code of Town of Oyster Bay § 103-24 (harbor defined as “to provide food or shelter to any dog”). “Thus, while the occasional presence of a dog in a premises does not rise to the level of harboring, where a dog is kept within a home on a consistent enough basis to become part of a household, it can be found that those who do not own the dog, but allow it to reside there and participate in its care, are harboring the dog’ ” (*Myers v Lobman*, 61 Misc 3d 1202(A) at \*3, quoting *Matthew H. v County of Nassau*,

131 AD3d at 145). Ordinarily, a party which does not own, harbor or exercise dominion over a dog cannot be held liable for its actions absent notice that the dog was being harbored on its premises; that the dog had vicious propensities and that the party had sufficient control over the premises to allow it to remove or control the dog (*J.R. v Poonam Apartments, LLC*, 186 AD3d 1421, 1422 [2d Dept 2020], citing *Sarno v Kelly*, 78 AD3d 1157, 1157 [2d Dept 2010]; *Collier v Zambito*, 1 NY3d at 446; *King v Hoffman*, 178 AD3d 906 [2d Dept 2019] [2d Dept 2019]; *Bukhtiyarova v Cohen*, 172 AD3d 1153, 1154 [2d Dept 2019] []; *Kraycer v Fowler St., LLC*, 147 AD3d 1038, 1039 [2d Dept 2017]; *Velez v. Andrejka*, 126 AD3d at 686). Accordingly, “[t]o recover against a landlord for injuries caused by a tenant's dog on a theory of strict liability, the plaintiff must demonstrate that the landlord: (1) had notice that a dog was being harbored on the premises, (2) knew or should have known that the dog had vicious propensities, and (3) had sufficient control of the premises to allow the landlord to remove or confine the dog” (*Sarno v Kelly*, 78 AD3d at 1157, citing *Bard v Jahnke*, supra; *Ali v Weigand*, 37 AD3d 628 [2d Dept 2007]; see also, *J.R. v Poonam Apartments, LLC*, 186 AD3d at 1422 citing *Sarno v Kelly*, 78 AD3d at 1157; *Collier v Zambito*, 1 NY3d at 446.; *King v Hoffman*, 178 AD3d 906; *Bukhtiyarova v Cohen*, 172 AD3d at 1154; *Kraycer v Fowler St., LLC*, 147 AD3d at 1039; *Velez v Andrejka*, 126 AD3d at 685)..

Here, the moving defendants have established, prima facie, that they did not own a dog at the subject premises; that they were not aware that a dog was being harbored on their properties nor should they have been; and that they did not know of a dog being kept at their properties which had any vicious propensities (*Elardi v Morales*, 192 AD3d 1074 [2d Dept 2021], quoting *Sarno v Kelly*, 78 AD3d at 1157; citing *J.R. v Poonam Apts., LLC*, 186 AD3d at 1422; *Kraycer v Fowler St., LLC*, 147 AD3d at 1039).

The plaintiff and AAAA Nassau oppose both defendants’ motions. They both note that a deposition has not been taken of anyone from the defendant 121 Bedell Street and the plaintiff notes that the deposition of AAAA Nassau’s owner, Omar Quizphe, has not been completed. More specifically, plaintiff seeks to learn more regarding 121 Bedell Street’s and AAAA Nassau’s knowledge about the dog being kept at their premises. Plaintiff notes that he testified that he observed the dog enter the garages on both of those defendants’ properties. Plaintiff opines that issues of fact exist as to whether Chelsea Real Properties’ tenant, AAAA Nassau, harbored the dog; whether Chelsea Real Properties knew that; whether the dog had vicious propensities; and, whether Chelsea Street Properties was aware of same. AAAA Nassau notes that the plaintiff only marked 121 Bedell’s garage doors when asked to identify the garage(s) he saw the dog go through, however, that mark is contrary to his testimony. It also notes that Kerry Thomas has not provided details about her presence at 121 Bedell Streets’ property, i.e., who would customarily be there, how often she went there, etc.

Neither opposing party has raised an issue of fact concerning 121 Bedell Street’s or Chelsea Real Properties’ possible liability.

Furthermore, “[w]hile determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (see, CPLR 3212[f]), [a] determination of summary judgment cannot be avoided by a

claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence. A party's mere hope that further discovery will reveal the existence of a triable issue of fact is insufficient to delay determination of the motion” (*Unity Electric, Co., Inc. v William Aversa 2012 Tr.*, 193 AD3d 792, 795 [2d Dept 2021], quoting *Williams v D & J School Bus, Inc.*, 69 AD3d 617, 619 [2d Dept 2010] [citations and internal quotation marks omitted]).

Here, both the plaintiff and AAAA have failed to provide an evidentiary basis for their assertion that further discovery would lead to additional relevant evidence” (*Unity Electric, Co., Inc. v William Aversa 2012 Tr.*, 193 AD3d at 795, citing CPLR 3212[f]; *Seaway Capital Corp. v 500 Sterling Realty Corp.*, 94 AD3d 856, 856–857 [2d Dept 2012]; *Williams v. D & J School Bus, Inc.*, 69 AD3d at 619).

It is beyond dispute that 121 Bedell Street’s property was used as a storage facility; 121 Bedell Street has established that it did not own a dog let alone the subject dog and no one associated with them in any way was regularly at the property that could have harbored a dog there. As for the possibility that a third party was harboring a dog at its property, 121 Bedell Street has also established that it reasonably had no knowledge of such, nor should it have. Therefore, neither the plaintiff nor AAAA have established that discovery might lead to relevant evidence with respect to 121 Bedell Street’s liability. In fact, despite both parties’ claims that discovery may lead to relevant evidence concerning 121 Bedell Street, both parties which have a constant presence at 121 Bedell Street’s property have not submitted any evidence that a dog was ever harbored at 121 Bedell Street’s property.

Accordingly, defendant, 121 Bedell Street’s, motion for summary judgment dismissing the complaint and any and all cross-claims is **GRANTED** and the complaint and any and all cross-claims against defendant, 121 Bedell Street, are dismissed.

Via his testimony at his examination-before-trial and his affidavit, Peter Andromidis, Chelsea Real Properties’ property manager, established that despite visiting the subject property regularly without warning, he never had any reason to believe that a dog was being harbored there. His testimony and attestations are consistent with Chelsea Properties’ and its client, AAAA Nassau’s, denials in response to the Notice to Admit wherein they denied any knowledge of a vicious dog at the premises.

Accordingly, defendant, Chelsea Properties’, motion for summary judgment dismissing the complaint and any and all cross-claims is **GRANTED** and the complaint and any and all cross-claims against defendant, Chelsea Properties, are dismissed.

As for the plaintiff’s motion to compel AAAA Nassau to produce outstanding discovery seeking authorizations to obtain all applications submitted, all contracts awarded, and all licenses granted for towing and storage of motor vehicles, as well as licenses from third parties, including municipalities and police departments, which AAAA Nassau may have obtained for which AAAA Nassau has previously denied possession, pursuant to the Decision and Order of the Hon. John M. Galasso, dated November 6, 2020, the court found AAAA Nassau’s responses to be satisfactory. Plaintiff maintains that said discovery may lead to evidence regarding storage of

towed vehicles; the location and enclosure of imposed enclosures; fencing requirements; security requirements including the use of guard dogs, etc. Plaintiff has failed to submit an affirmation of good faith indicating that efforts have been made to resolve the discovery issue prior to engaging in motion practice, as required by 22 NYCRR 202.7(a)(2) (*Belle-Fleur v Desriviere*, 178 AD3d 993, 995 [2d Dept 2019], citing *Goodwin v Guardian Life Ins. Co. of Am.*, 156 AD3d 765, 767 [2d Dept 2017]; *Perez v Stonehill*, 121 AD3d 960, 961[2d Dept 2014]). Furthermore, assuming arguendo that this application was properly advanced, the relevance of these documents to the issue of AAAA Nassau's possible liability here, i.e., its ownership or harboring of a dog at its property, has not been established. Finally, no grounds for costs have been set forth.

Accordingly, plaintiff's motion to, among other things, compel AAAA Nassau to produce outstanding discovery is **DENIED**.

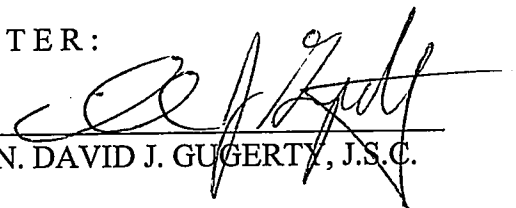
Any applications not specifically referenced are denied.

Plaintiff and remaining defendant, AAAA Nassau, are to appear for a conference via **Microsoft Teams on September 23, 2021 at 12:00 p.m.**

This constitutes the decision and order of the court.

Dated: August 23, 2021  
Mineola, NY

ENTER:



HON. DAVID J. GUGERTY, J.S.C.

**ENTERED**

**Aug 27 2021**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE