

Synder v Wu

2021 NY Slip Op 34166(U)

January 7, 2021

Supreme Court, Queens County

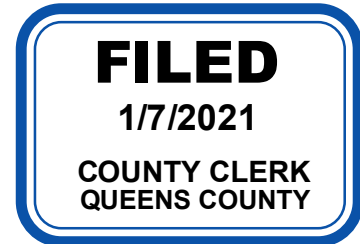
Docket Number: Index No. 703381/18

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



PRESENT: Hon. Leslie J. Purificacion, JSC

Part 39

ELANA J. SYNDER,

Index No: 703381/18

Plaintiff

-against-

DECISION/ORDER

IVAN WU and JANNIE WU,

Motion Seq: 2

Defendants.

The following papers numbered 1 to 9 read on motion by defendants for summary judgment pursuant to CPLR § 3212 dismissing the plaintiff's complaint.

	<u>PAPERS NUMBERED</u>
N.M., Aff., Exhibits and Service.....	1-4
Answering Aff., Exhibits and Service.....	5-7
Reply and Service.....	8-9

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

Plaintiff Elana Synder commenced this action for personal injuries sustained as the result of a dog bite on November 10, 2016 on the premise located at 40-53 62nd Street in Queens County. Defendants Ivan Wu and Jannie Wu are the owners of the dog named "Dexter", who at the time of the incident was a 4 year old Shiba Inu, weighing approximately 25 pounds. The incident occurred in the lobby of the building where the plaintiff and defendants are tenants. In her verified complaint, plaintiff alleges that Dexter had vicious propensities and that the defendants were aware or should have been away of his vicious propensities. She further alleges that due to the defendants' carelessness, negligence and reckless disregard for the safety of others,

plaintiff was seriously and permanently injured. Defendants now move for summary judgment dismissing the complaint on the grounds that Dexter did not have known vicious propensities.

In support of their motion, defendants submit a copy of the pleadings; an affirmation from counsel; affidavits from the defendants; and the examination before trial transcripts of plaintiff and defendants.

In her deposition transcript, Mrs. Wu stated that she purchased Dexter from a store when he was between 3 and 7 months old. Approximately a year before the incident, the defendants moved to the premise and Dexter became "grumpy", "withdrawn" and had a "poor appetite". While Mrs. Wu alleges Dexter got better, Mrs. Wu admitted that Dexter did not like other dogs and would bark, growl and pull toward them. Mrs. Wu stated that Dexter also jumped on people who entered their home but had never bitten any people or dogs. Mrs. Wu further stated that she no longer has Dexter because she recently had a baby and after several months she found her apartment is too small for both. The defendants gave Dexter to an organization.

On the morning of November 10, 2016, around 8:00 A.M., Mrs. Wu was returning from taking Dexter for a walk and entered the lobby of their building. She described the lobby as a small, narrow space with a table for mail and packages. She stopped to check the mail with Dexter next to her on a leash when the plaintiff exited the elevator. Mrs. Wu claims that she turned to smile at the plaintiff and observed the plaintiff lean toward Dexter with her hand extended to pet him. Without any warning signals, Dexter bit the plaintiff's left hand.

Defendants also submit the deposition transcript of the plaintiff who testified that she was on her way to work the morning of the incident. Plaintiff stated that she was exiting the elevator and exchanged pleasantries with Mrs. Wu. Plaintiff claims she had her hands by her side and Dexter was smelling her hand. Without any warning, Dexter bit her hand latching on and Mrs. Wu had to rip him off. Plaintiff claims that Mrs. Wu apologized to her stating that Dexter's personality had changed and they did not know what to do. Plaintiff went back to her apartment to assess the wound and then she went to the hospital. Plaintiff claims that the next time she saw Dexter he lunged at her and she ran away.

With respect to previous encounters with Dexter, plaintiff avers that it was known in the building that Dexter was not a nice dog. The Wus have a sliding glass door in their apartment and Dexter could be seen barking and viciously going after the door every time someone walked by it. Plaintiff also claimed that when she would see the defendants walking Dexter, you could see them pulling Dexter away from people walking by or cross the street while the dog was barking at them.

The proponent of summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v. City of New York, 49 N.Y.2d 557). To recover in strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner knew or should have known of such propensities (see Jennings v Nespolino, 6 A.D.3d 582; Collier v. Zambito, 1 N.Y.3d

444). Vicious propensities have been defined as the propensity to do any act that might endanger the safety of persons or property. Evidence of these propensities include a prior attack, growling, snapping, lunging, baring its teeth, manner of restraining and a "proclivity to act in a way that puts others at risk of harm" (see Carroll v. Kontarinis, 150 A.D.3d 960; Jones v. Pennsylvania Meat Market, 78 A.D. 3d 658).

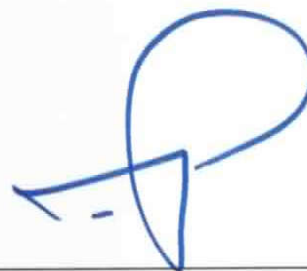
Here, the defendants have made their prima facie entitlement to judgment as a matter of law by establishing that they were not aware, or should not have been aware, that Dexter had vicious propensities toward humans. Although the plaintiff's deposition testimony indicated that Dexter had a reputation of not being nice and that she had seen the defendants on walks with the dog where it appeared the dog was being pulled back, the behavior described does not rise to viciousness. In addition, the one incident that plaintiff described where Dexter lunged at her occurred after the dog bite incident. Thus, the burden shifts to the plaintiff to raise a triable issue of fact.

In opposition to the motion, plaintiff submits the affidavit of Robert Kaufer who is also a resident of the building. Mr. Kaufer stated that Dexter had a reputation within the apartment building for being aggressive because he usually barked and lunged at people and other dogs. Mr. Kaufer further stated that he frequently saw Dexter and on numerous occasions Dexter had lunged toward him and barked at him when in the same vicinity. Mr. Kaufer avers that Mr. Wu had often told him to keep his distance from the dog due to these aggressive tendencies. On one occasion, after Mr. Kaufer joked that the dog needed anti-anxiety medication, Mr. Wu responded that it would be best if he just stayed away from the dog. Mr. Kaufer stated that he personally found Dexter intimidating, aggressive and vicious.

The court finds that plaintiff has raised a triable issue of fact as to whether defendants were aware of Dexter's vicious propensities or should have been aware of his vicious propensities. The affidavit of Robert Kaufer clearly indicates that Mr. Wu knew that Dexter had a tendency to lunge and bark at people (Jones v. Pennsylvania Meat Market, 78 A.D.3d 658). Mr. Kaufer states that Mr. Wu even warned Mr. Kaufer to keep his distance from the dog. Mr. Kaufer's assessment of Dexter vicious propensities is also collaborated by the plaintiff's own observations of Dexter's behavior during walks and from the window of the Wu's home.

Accordingly, the motion is denied.

Date: JAN 07 2021



Hon. Leslie J. Purificacion, J.S.C.

