

<b>Gershik v NYCHA</b>
2022 NY Slip Op 31031(U)
March 31, 2022
Supreme Court, Kings County
Docket Number: Index No. 515897/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

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**YEFIM GERSHIK,**

**Plaintiff,**

**-against-**

**DECISION / ORDER**

**Index No. 515897/2018**

**Motion Seq. No. 1**

**Date Submitted: 3/31/22**

**NYCHA,**

**Defendant.**

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*Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion for summary judgment*

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<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation, Affidavits and Exhibits Annexed.....	<u>19-30</u>
Affirmation in Opposition to Motion and Exhibits Annexed.....	<u>31-33, 36</u>
Reply Affirmation.....	<u>35</u>

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

This action arises from an incident which took place on March 23, 2018 and resulted in this suit being filed on August 3, 2018, wherein plaintiff claims he was bitten by a dog while working for Meals on Wheels and delivering food to a tenant at defendant's premises, specifically, 2926 West 25<sup>th</sup> Street in Coney Island, and that he is entitled to damages for his injuries. The case is on the trial calendar, and defendant now moves for summary judgment. After virtual oral argument, the motion is granted, and the complaint is dismissed.

In support of the motion, defendant provides the pleadings, plaintiff's EBT transcript, the EBT transcript of an employee in the management office, Mr. Lamel Moore, a "caretaker" and an affidavit from another employee, Ms. Tropiansky, an

assistant property manager. She avers in her affidavit that she supervises and oversees the “occurrence reports” for Surfside Gardens, which includes this building. She states that tenants who have dogs must “register them” and the last time someone did for this building was in 2009. She then states [Doc 27] “If a complaint is made to the Housing Authority about any incident involving a dog, including a dog attack, a dog bite, or any other dangerous dog activity such as growling, snapping, or baring of teeth, an Occurrence Report is prepared and kept at the development management office located at 2940 West 31st Street, Brooklyn, New York. I have conducted a search for any and all Occurrence Reports pertaining to any dog related incidents or complaints at 2926 West 25<sup>th</sup> Street, Brooklyn, NY, for a period of two years prior to and including March 23, 2018. My search revealed no records of any such reported incidents or complaints. I have not received any such complaints or reports of similar prior incidents during the relevant time frame.” Mr. Moore testified that he had never seen anyone come into the building with a dog.

The issue in this case is that the plaintiff, four years since this incident, has not identified the person who he alleges was the tenant of the building, nor has he identified the “employee” he allegedly spoke to when he claims he observed this same dog behaving “viciously” toward another dog. He testified that he was at this premises for about a year before the accident to deliver food every Monday through Friday.

Where, as here, a plaintiff seeks to recover against a landlord under a theory of strict liability for a dog bite, the plaintiff must prove that the landlord had notice that a dog was being harbored on the premises, and that the landlord knew or should have known that the dog had vicious propensities. For example, in *Almodovar v NYCHA*, 177

AD3d 424 [1<sup>st</sup> Dept 2019], the court found that the defendant could not make a prima facie case as its witness, the manager, testified that his office “does not keep records of complaints involving vicious animals.” On the other hand, in *Ortiz v NYCHA*, 105 AD3d 652 [1<sup>st</sup> Dept 2013], the court said that another tenant’s affidavit that he knew the dog, was aware that it was aggressive and had previously attacked someone, was only his personal knowledge, and was insufficient to “impute knowledge of the dog’s vicious propensities to NYCHA.” See also, *Finney v Fraioli*, 281 AD2d 389 (2nd Dept. 2001); *Bemiss v Acken*, 273 AD2d 332 (2nd Dept. 2000); *Lebron v New York City Hous. Auth.*, 268 AD2d 563 (2nd Dept. 2000).

In a motion for summary judgment, the evidence must be viewed in the light most favorable to the plaintiff. See *Meyers v. Haskins*, 140 AD 2d 923 (1st Dept. 1988). The Court of Appeals held, in *Baisi v Gonzalez*, 97 NY 2d 694 (2002), that where there are issues of fact as to the landlord’s knowledge of the presence of a dog with vicious propensities on the property, summary judgement was not appropriate. In that case, the Appellate Division Second Department had granted summary judgment to the defendant, finding that plaintiff had failed to raise a triable issue of fact, as the plaintiff must prove that the landlord had notice that a dog was being harbored on the premises, and that the landlord knew or should have known of its vicious propensities. See also *Gibbs, v Grenadier Realty Corp.*, 173 AD 2d 171 (1st Dept. 1991).

In opposition to the motion, plaintiff provides an affirmation from counsel and a copy of the transcript of his 50-h hearing, taken on August 3, 2018. Therein, he states that the dog had “vicious propensities” as he had previously [February 2018] seen it “attacking another dog.” No further specifics are provided at that time. He testified that

he had three bags of food and the woman with the dog entered the elevator and the dog went for the food and bit his finger [Doc 36 Page 62].

At his EBT, conducted three years after the incident, plaintiff was asked about the February sighting of this same dog. He said [Page 129] an unidentified employee told him the dog “had been trying to attack other dogs.” That is hearsay, of course. His personal observation was “it barked several times and then it started pulling to attack the other dog.” This does not describe “vicious propensities” as the case law defines it. Dogs bark at each other. The court viewed all 197 references to the word “dog” in the first transcript and that is all there is on the issue of the dog having “vicious propensities.” Plus, some difficulties with the Russian interpreter about the gender of the noun “dog” versus the gender of this dog. Funny, but irrelevant. In the second EBT transcript, Doc 25, there are 114 references to the word “dog.” The questions return to the February observation. Plaintiff testified that the dog was on the sidewalk, and he observed it. He saw the dog see another dog and they [Page 155] “started sniffing each other or I don’t know what.” Then as he was entering the building, the other dog made a squealing noise and he turned around. They were about twenty feet away, on the grass. He concluded [Page 155] “that dog was trying to bite the neck of the other dog.” Asked what happened, he said [P 156-157] “they were taken apart and that’s it. I did not notice anything else.”

The court concludes that plaintiff has not overcome the defendant’s prima facie case. He cannot identify the dog’s owner, cannot establish that she lived at the building, and cannot identify the employee he spoke to or the other dog owner. Further, a plaintiff cannot establish that a dog had “vicious propensities” by observing it play or

bark or even snap at another dog while on a leash. the dog barked at her and her dog and that the dog strained its leash toward her dog was insufficient to raise a triable issue of fact as to whether it had vicious propensities (*Bukhtiyarova v Cohen*, 172 AD3d 1153, 1155 [2d Dept 2019]). Even giving plaintiff the benefit of every possible inference, to deny this motion would be erroneous.

Accordingly, the motion is granted, and the complaint is dismissed.

This shall constitute the decision and order of the court.

Dated: March 31, 2022

ENTER:



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Hon. Debra Silber, J.S.C.