STATE OF NEW YORK
SUPREME COURT ONONDAGA COUNTY

REBECCA M. FLANDERS,

Plaintiff,

v.

STEPHEN F. AND MICHELLE GOODFELLOW,

Defendants.

DECISION AND ORDER

Index No: 002769/2020

Before: Honorable Joseph E. Lamendola, JSC

Plaintiff commenced this action by filing a verified complaint on March 17, 2020, seeking damages for personal injuries that arose when Plaintiff was bit by Defendants' dog. The matter was joined by the filing of Defendants' answer on May 22, 2020. The action arises out of allegations that on December 8, 2018, while delivering a package to the Defendants' residence at 4260 Henneberry Road, Manlius, New York, Plaintiff, a US Postal employee, was bit by Defendants' dog causing her serious physical injury. Plaintiff alleges two causes of action based upon either the negligence or strict liability of the Defendants who knew or should have known of their dog's vicious and/or aggressive propensities.

Defendants seek summary judgment pursuant to CPLR 3212, alleging that they bear no liability for the subject dog bite as there exists no evidence that Defendants had prior knowledge of their dog's alleged vicious propensities.

The court's function with respect to a motion for summary judgment is issue finding rather than issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 (1957). Summary judgment has been described as a "drastic remedy" because it amounts to a finding by the court that there is no issue of fact to be resolved

at a trial, thereby obviating the need for any trial at all. *Andre v. Pomeroy*, 35 NY2d 361 (1974). However, where there is no genuine material issue of fact summary judgment must be granted. CPLR §3212; *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). When the defendant is the party seeking summary judgment, the "prima facie showing which a defendant must make...is governed by the allegations of liability" as set forth in the pleadings. *Celestin v. 40 Empire Blvd, Inc.*, 168 AD3rd 805, 807 (2nd Dept., 2019); see also *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324-5 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. *Weinsrad v. New York Univ. Med Ctr.*, 64 NY2d 851, 853 (1985).

Once that initial burden is satisfied, the "burden of production" shifts to the opponent, who must produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. *Alvarez*, 68 NY2d 320. The opponent's proffer must constitute more than "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). In the face of a motion for summary judgment, the party against whom it is sought is obligated to lay bare his proof, that is, to demonstrate by affidavit or otherwise that one or more triable issues of fact genuinely exist. The court reviews a summary judgment motion in the light most favorable to the party opposing it, giving that party the benefit of every inference that may be reasonably and fairly drawn. *Ugarriza v. Schmieder*, 46 NY2d 471, 475-6 (1979); *Secore v. Allen*, 27 AD3d 825 (3d Dept 2006). Through that prism, the court determines whether any triable issue of a material fact exists.

"For at least 188 years…the law of this state has been that the owner of a domestic animal who either knows or should have known of the animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities. *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." *Id., citing Dickson v. McCoy*, 39 NY 400, 403 [1868]. Factors to be considered include whether the dog has been known to growl, snap or bear its teeth, whether the dog has been restrained and the manner of such restraint, and/or the keeping of the dog as a guard dog. *Id.* 1 NY3d at 447. Also to be considered is whether the dog has acted "in a way that puts others at risk of harm…albeit **only** when such proclivity results in the injury giving rise to the lawsuit." *Id.* In contrast, behavior such as barking and running around, or 'normal canine behavior,' does not amount to vicious propensities. *Brady v. Contangelo*, 148 AD3d 1544, 1546 [4th Dept. 2017]

Proof of an owner's knowledge of the dog's proclivities "may be established by proof of prior acts of a similar kind of which the owner had knowledge." *Christopher P. v. Kathleen M. B.*, 174 AD3d 1460 [4th Dept. 2019], *citing Collier (supra)*.

Defendants satisfied their initial burden on summary judgment by submitting their sworn deposition testimony, as well as that of the Plaintiff and their dog trainer, Greg Gorman, which established the following:

- Defendants had purchased the dog at issue, Murdock, as a puppy, and had owned him for two or three years prior to the December 8, 2018 biting incident

- Defendants sent Murdock for two-weeks of off-site training with Mr. Gorman to address his pulling behavior on leash, and to teach him to respond to voice commands so he could run unleashed in the backyard
- Prior to the training, Murdock would chase squirrels and deer
- Murdock would jump when happy/excited to greet people he knew
- Murdock would bark at passersby and strangers coming to the house
- Prior to the underlying biting incident, Murdock had never growled, bore his teeth, snapped at, or bit anyone
- On December 8, 2018, Murdock barked as Plaintiff approached the house, and as she was delivering the package Murdock lunged and bit Plaintiff in the shoulder without warning
- Defendant Stephen Goodfellow had left the door open behind him when he came to collect the package from Plaintiff
- Defendant Stephen Goodfellow was surprised and totally caught off guard when Murdock attacked Plaintiff
- Greg Gorman had trained Murdock for two weeks because Murdock didn't walk well on a leash (pulling & yanking people), and he couldn't be trusted off leash to not run off and chase wild animals
- During those two weeks of training, Gorman did not observe any aggressive tendencies in Murdock, especially toward people
- Gorman was not asked to address any aggressive behaviors when training Murdock, and was surprised when he learned of the December 8, 2018 attack
- Plaintiff had never encountered Murdock prior to the attack, nor was she aware of any prior attacks by Murdock
- Plaintiff heard a dog barking before exiting her delivery vehicle, when she didn't see a dog outside she exited the vehicle to deliver Defendants' packages
- Postal employees who have reason to believe there is a dangerous dog at a residence on their route are supposed to notify the post office and a warning is entered into their scanning equipment
- On December 8, 2018, prior to approaching the house, Plaintiff scanned Defendants' packages. Her scanner did not report a dangerous dog warning
- Plaintiff intended to leave the package on the porch, however Defendant Stephen Goodfellow opened the door to retrieve the packages. He left the door open.
- Plaintiff only heard the "ticking" of Murdock's nails on the floor inside before Murdock came out the door, lunging and biting her twice on the shoulder
- Plaintiff had no warning that Murdock was going to attack her – he did not growl or bear his teeth before biting her

In summary, the evidence established that Defendants had never known Murdock to exhibit aggressive behavior, nor had anyone ever advised them or complained to them about Murdock's behavior. The evidence made clear that Murdoch was kept as a family pet, not as a guard dog. Further, the fact that the Defendant would

open the door on the day of the underlying incident and not bar the dogs from exiting seems to demonstrate that he "did not conceive of the possibility that the dog would attack." *Collier v Zambito*, 1 NY3d at 448.

The burden then shifts to Plaintiff to establish the existence of a material issue of fact. Plaintiff has failed to meet this burden. In opposition, Plaintiff submitted her own testimony as well as affidavits from two fellow postal employees, Brian Harp and Eugene Georgevich. There is nothing within Plaintiff's deposition testimony or affidavit that demonstrates prior knowledge on the part of the Defendants that Murdock possessed any vicious propensities. She had no personal knowledge of Murdock, nor any warning from fellow postal employees that Murdock was considered a dangerous dog. Nor did she have any warning that Murdock was going to bite her, having only heard him bark, not growl or bear his teeth. The affidavits of Brian Harp and Eugene Georgevich are equally deficient as to any evidence that the Defendants knew or should have known that Murdock had vicious propensities. Assuming that the anecdotal reports of Harp and Georgevich are true for purposes of the present motion, and that Murdock had barked, bit at the glass trying to attack them through the glass, teeth bared, snarling and growling, slamming into the window glass, neither of them reported this dangerous behavior to either the post office, or the defendant homeowners. Nor did either Harp or Georgevich attest that the owners were home during these aggressive displays. Both affidavits are notable for what they don't say – they don't say that the Defendants were present to witness the dangerous behavior. It is also worth noting that Plaintiff testified that she had dangerous dog warnings come up on her scanner "well over a hundred times," but no such warning was lodged by Brian Harp for Murdock who

he described as the "most aggressive dog I have ever encountered" and who he compared to the movie Cujo.

The Plaintiff having failed to create a material issue of fact as to whether the Defendants knew or should have known of Murdock's alleged vicious propensities, Defendants are entitled to summary judgment on the second cause of action sounding in strict liability.

Plaintiff's first cause of action for negligence must also be dismissed. It is well settled that "[c]ases involving injuries inflicted by domestic animals may only proceed under strict liability based on the owner's knowledge of the animals vicious propensities, not on theories of common-law negligence." *Blake v. County of Wyoming*, 147 AD3d 1365, 1367 [4th Dept 2017] (emphasis added). See also *Russell v. Hunt*, 158 Ad3d 1184,1185 [4th Dept 2018].

The Court has considered the remaining arguments of counsel and finds them to be unavailing. Therefore, it is hereby

ORDERED, that Defendants' motions for summary judgment is **GRANTED** and the Complaint **DISMISSED** in its entirety.

DATED: August 8th, 2022

HON. JOSEPH E. LAMENDOLA, JSC

PAPERS CONSIDERED:

1) Defendants' Notice of Motion, filed April 27, 2022 (NYSCEF #41,52)

2) Defendants' Attorney Affirmation, filed April 27, 2022 (NYSCEF #42)

3) Defendants' Exhibits, filed April 27, 2022 (NYSCEF #43-50)

4) Defendants' Statement of Material Facts, filed April 27, 2022 (NYSCEF #51)

5) Plaintiff's Attorney Affirmation in Opposition, filed June 9, 2022 (NYSCEF #55)

6) Exhibits, filed June 9, 2022 (NYSCEF #56-60)

7) Plaintiff's Statement of Material Facts, filed June 9, 2022 (NYSCEF #61)

8) Defendants' Reply Affirmation, filed June 14, 2022 (NYSCEF #62)