

**Erizpohov v Luna Park Hous. Corp.**

2023 NY Slip Op 32536(U)

July 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 519751/2019

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: PART 9**

\_\_\_\_\_X

**COURTNEY ERIZPOHOV,**

**Plaintiff,**

**-against-**

**LUNA PARK HOUSING CORPORATION,  
MARINA LUPA, MAYA LUPA and  
KONSTANTIN BOGATYREV,**

**Defendants.**

\_\_\_\_\_X

**DECISION / ORDER**

**Index No. 519751/2019  
Motion Seq. No. 3  
Date Submitted: 6/15/23**

**LUNA PARK HOUSING CORPORATION,**

**Second Third-Party Plaintiffs,**

**-against-**

**VALOR SECURITY & INVESTIGATIONS, INC.,**

**Second Third-Party Defendants.**

\_\_\_\_\_X

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants  
Maya Lupa and Konstantin Bogatyrev's motion for summary judgment.*

<b>Papers</b>	<b>NYSCEF Doc.</b>
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>111-117</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>120-132, 133</u>
Reply Affirmation.....	<u>134</u>

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

This is a personal injury action arising from an alleged dog-related incident which took place on July 25, 2019. In motion sequence #3, defendants Maya Lupa and Konstantin Bogatyrev move for an order granting them summary judgment and dismissing the complaint as against them, along with all cross claims.

Prior to the argument of this motion, plaintiff discontinued this action as against defendants Polina Grobman and Leonid Grobman [Document 30], and defendant Luna Park

discontinued its third-party action against them as well. On the day this motion was argued, the court granted defendant Grigory Lupa's motion (seq. #2) to dismiss the complaint as against him, by order dated 6/16/23. This motion was filed as a cross-motion to that motion. The caption above has been amended to reflect these changes, and it is hereby ordered that the caption is amended accordingly.

### **Background**

This action was commenced in September of 2019 against defendant Luna Park Housing Corporation (hereafter "Luna Park"). The complaint states [¶22] that on July 25, 2019, while plaintiff was "lawfully present on the premises which is located at 2816 W. 8th Street, in Kings County, the State of New York, she was attacked by a dog that was being harbored on the premises, causing her to suffer serious physical injuries." Defendant Luna Park answered the complaint, and commenced its (now discontinued) third-party action against the Grobmans on 1/3/2020. Apparently, they owned a similar-looking dog. Plaintiff then timely added the Grobmans as direct defendants, with a supplemental summons and amended complaint. Polina Grobman answered the amended complaint and cross-claimed against Luna Park.

A stipulation was then filed on 5/12/20 which was signed by plaintiff and Luna Park, but not Polina Grobman, permitting plaintiff to add Grigory Lupa and Marina Lupa as additional defendants. CPLR 1003 permits the addition of parties if all existing parties so stipulate. A supplemental summons and amended complaint were filed on 5/26/20 [Docs 16 and 17]. On the same day, however, plaintiff decided to add more defendants, movants Maya Lupa and Konstantin Bogatyrev, without leave of court or the benefit of a stipulation, e-filed as Documents 18 and 19.<sup>1</sup> On 6/30/20, Marina Lupa filed an answer with a cross-

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<sup>1</sup> While they were not properly added to the case, they waived their right to object by not raising an objection as an affirmative defense in their answer or moving to dismiss on this basis.

claim against the co-defendants. Grigory Lupa (dismissed) then answered the complaint. On 8/6/20, plaintiff discontinued the action as against both Grobman's. Then, defendants Maya Lupa and Konstantin Bogatyrev, the movants herein, answered the complaint and cross-claimed against the co-defendants. Subsequently, Maya Lupa and Konstantin Bogatyrev answered Marina Lupa's cross-claims, and Marina Lupa answered Maya Lupa and Konstantin Bogatyrev's cross-claims. Defendant Luna Park then answered plaintiff's amended complaint (Doc 41) and asserted cross-claims against the co-defendants. Maya Lupa and Konstantin Bogatyrev then answered Luna Park's cross-claims. Plaintiff then made a motion to compel discovery (motion Seq. #1). Defendant Luna Park next brought the second third-party action against Valor Security & Investigations, Inc. (hereafter "Valor") [Doc 84]. Valor answered, with twenty seven affirmative defenses, a counter-claim against Luna Park, and two cross-claims against the co-defendants.

On 2/7/23, Grigory Lupa filed his motion for summary judgment (seq. #2), and on 4/15/23, movants filed the instant cross-motion. The note of issue is due to be filed on or before August 25, 2023.

### **Maya Lupa and Konstantin Bogatyrev's Motion**

Defendants support their motion with the pleadings, an affirmation of counsel, their EBT transcripts, plaintiff's emergency room record and an EBT transcript of the resident physician who made the entries in the record. Movants' counsel first sets forth the procedural history of this action, and notes that every defendant who was added to the action was alleged to be the owner of the dog that plaintiff claims attacked her. Counsel then asserts that his clients are husband and wife, and were the dog's owners on the date of the incident.

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See *Public Administrator of Kings County v McBride*, 15 AD3d 558 [2d Dept 2005]; *Hulse v Wirth*, 175 AD3d 1276 [2d Dept 2019]; *McDaniel v Clarkstown Central District*, 83 AD2d 624 [2d Sept 1981].

Counsel avers that “[a] review of the evidence demonstrates that the moving defendants, Maya Lupa and Konstantin Bogatyrev, cannot be charged with liability for the occurrence of the subject accident” [Doc 112 ¶21]. He continues “[f]or injuries caused by a domestic animal, Plaintiff must establish that the owner knew or should have known of the animal's ‘vicious propensity’ prior to the alleged injury” [*id* ¶24]. Further, “[h]ere, there is no evidence demonstrating that defendants Maya Lupa and Konstantin Bogatyrev knew or should have known that the subject dog, Xena, possessed a vicious propensity” [*id* ¶25].

According to counsel's affirmation, neither Maya Lupa nor Konstantin Bogatyrev were present at the time of the incident, and did not witness it. Apparently, Marina Lupa was walking the dog at the time. Counsel avers that both of his clients testified at their depositions that they had no knowledge that Xena had a vicious propensity, and that there were no prior incidents or complaints. He points out that Luna Park's witness testified that the housing complex had not received any complaints about the dog prior to plaintiff's incident. Thus, counsel concludes, as plaintiff has only provided hearsay to support her claims that the dog had a vicious propensity, she fails to overcome their prima facie case, and the complaint should be dismissed.

A second argument is also posited. Movants' counsel provides a copy of plaintiff's emergency room records, which are not certified, but were presumably provided by or authorized by plaintiff, wherein plaintiff informed the hospital staff that she injured her shoulder when a mirror that was standing on the floor fell onto her arm. She told the resident she had a pre-existing injury of her shoulder. The emergency room resident physician who made these notes in the hospital record, Braxton Lee, was deposed [Doc 117]. At his deposition, he authenticated the record and his notes. He also confirmed that it was “signed off” by his attending physician, his supervisor. He testified that he received the information

directly from the patient, the plaintiff, who was twenty years old at the time. He testified that if an interpreter had been used, or if someone else had spoken to him on the patient's behalf, he would have made a note of that information.

Defendants provide their EBT transcripts. Maya Lupa testified that Xena has never attacked any dogs or any people, and has never been involved in any fights with any other dogs or attacked any people, and "is very sweet" [Doc 114 Page 57]. She described the dog's good relationship with her daughter, as a baby and as a toddler. Co-defendant Konstantin Bogatyrev similarly testified that Xena had never bitten any dog or person [Doc 115 Page 120].

The court finds that defendants make a prima facie showing that they had no knowledge that the subject dog had any vicious propensities.

Defendant Luna Park opposes the motion to the extent that if the movants, the dog's owners, are dismissed from the case, Luna Park's cross-claims against them should not be dismissed, but should "be transformed into a third-party complaint."

Plaintiff opposes the motion. Plaintiff submits an attorney's affirmation, numerous EBTs and several other documents, which the court will discuss one at a time.

Plaintiff's attorney first claims that the motion is premature, as he has not yet obtained Xena's veterinary records, "which very well could show the dog's Xena vicious propensities" [Doc 120 ¶5]. He avers that the motion should be denied as "plaintiff has produced facts in evidentiary form which establish the dog Xena had vicious propensities of which the defendant owners of the dog, Ms. Maya Lupa and Mr. Konstantin Bogatyrev, knew, or should have known. The owner of an animal with vicious propensities is absolutely liable for injuries and damages inflicted on others by that animal" [*id.* ¶6].

Counsel states that the plaintiff's parents have provided affidavits that state that they

have “observed the dog, on several occasions . . . standing still and stiff with ears forward, showing its teeth, barking, lunging and snapping or biting” [*id.* ¶12]. Counsel further states that he has provided an affidavit of a witness, Melony Shulman, [Doc 125], that states that the subject dog bit her dog five months before the incident, and that she reported it to the Luna Park management office. Finally, he provides plaintiff’s EBT transcript. He concludes that “[a]ll of this constitutes evidence that the dog Xena, belonging to Maya Lupa and her husband Konstantin Bogatyrev, had vicious propensities of which they knew, or should have known” [*id.* ¶16].

Plaintiff’s attorney also argues that he has provided medical records which “state that plaintiff was attacked by a dog, and was not injured in any incident involving a mirror falling on her at home” [*id.* ¶19].

The court considers the plaintiff’s parents to be interested parties, and has not considered their affidavits. Ms. Shulman, plaintiff’s friend, provides an affidavit [Doc 125] that is dated May 18, 2023, which provides no details of the incident except to say that she “was present when [plaintiff and her dog] were attacked by a dog named Xena which belongs to [defendants]. The dog, Xena at the time was being walked on a leash by Marina Lupa.” She goes on to say that “my dog was attacked and viciously bit on the neck by [this dog] in mid-February of 2019. . . . I reported the attack on my dog to the management.”

Plaintiff testified at her EBT [Doc 126] that she was born in 1998. She weighs 97 pounds. She has a college degree. At the time of the incident, she was still in college and was a summer intern, working three days a week. Her job that summer entailed “a lot of moving and unpacking and packing” [*id.* Page144]. She owned two dachshunds at the time of the incident. They were registered with the management office. She was asked about the incident on July 25, 2019. She testified that it was dark out, in the evening. Asked what

she reviewed before her deposition, she said she had reviewed the surveillance footage of the incident. The dog's owners lived on the same floor as the plaintiff and her parents, in her building, and the dog walker (Marina Lupa) and her husband (Grigory Lupa) also live in the building. They are defendant Maya Lupa's parents. The dog's owners have moved out of the building since the incident. When asked whether she knew if the dog had injured anyone before her incident, plaintiff responded that she learned from Ms. Shulman that the dog, Xena, had bit her dog, and that Ms. Shulman had reported it to the management office. Other than that, she testified that unnamed people had told her that they have had problems with this dog, "I can give you names, but it was nothing that they went to the management and said this dog is being too aggressive" [Doc 126 Page 53]. She then acknowledged that she did not know their names. Clearly, this is hearsay and is neither admissible nor probative.

Plaintiff testified that the incident was on a Thursday, and she was returning home from walking her dog with Melony Shulman, who was also walking her dog, a Yorkipoo. They had gone to the dog run. Marina Lupa was walking Xena, and as she approached the building, Xena "lunged at me and she lost control of the leash [and dropped it], . . . and the dog came darting at me and my dog" [Page 61]. She describes the incident as follows:

"I mean, it all happened very quickly. I mean, you know, dogs are fast so I didn't have much to do. I grabbed my dog in my arms, and when the dog came towards me and my dog, she or he -- I don't know if it's a girl or a boy dog -- bit my dog from up top. My dog -- we both fell because the dog jumped onto me. We both fell, my dog fell out of my arms and she ran into the street where some stranger that was walking by caught her and I was on the floor with the dog. And at that time, Marina came and picked up her dog off me. . . . I fell on my entire right side because when I picked up my dog, I turned away from the dog to cover my dog. I fell on my right side hitting the sidewalk, falling on my shoulder and my hip and my leg, causing me to just lay there. And couple days later I was completely bruised on my right side" [Doc 126 Pages 63-65].

Plaintiff then testified that Marina Lupa was holding a cigarette in one hand, and a cell phone in the other, and that Xena, a pit bull, was on a retractable leash, and that Marina Lupa was not “in control of the dog” [*id.* Page 67]. A crowd apparently gathered, “because I was screaming and crying and yelling.” She said she called her parents, they came downstairs right away and accompanied her to the veterinary “emergency room.” By then it was around midnight. The next day, she brought her dog to her regular vet’s office, and they stitched her dog’s wounds and kept her for a few days.

Plaintiff said she had sustained scratches from the incident, from falling onto the sidewalk, and bruises appeared later. Asked “when the pit bull came towards you and you were holding your dog, did he bite you?” she responded “No, the pit bull didn’t bite me” [*id.* Pages 122-123]. She testified that four days later, “Monday I waited to go to the management office to report the issue because they were closed over the weekend. As I was changing to go to the management office, my shoulder dislocated” [*id.* Page 76]. She testified that she then called her mother, and they went to her physician Dmitriy Ratsenberg, M.D.’s office, which was a five-minute walk from her home. Dr. Ratsenberg said her shoulder was dislocated and he called an ambulance to take her to the emergency room. She said that her mother accompanied her to the hospital, and although her mother “doesn’t speak good English” she “was doing most of the speaking to the doctors and the nurses” [*id.* Page 82]. A mirror did not fall on her, she testified. She said “I was looking into the mirror, it was just in front of me, and that when I was putting on a T-shirt, my arm dislocated” The ER gave her anesthesia and put her shoulder “back into place.” She did not receive any other treatment or medication. She tried physical therapy for her shoulder, but it did not help and in September of 2020 she had arthroscopic surgery to her shoulder. In 2012, she had back surgery for scoliosis, and has rods in her back [*id.* Pages 96-99].

Plaintiff next provides the EBT transcript for defendant Marina Lupa [Doc 130], which was held on January 26, 2022. At the deposition, she testified that she does not live at Luna Park, and that she is separated from her husband, Grigory Lupa. They were separated before the day of the plaintiff's incident. Mr. Grigory Lupa still lives at Luna Park. Her daughter Maya Lupa lived at Luna Park, with Maya's daughter, (her granddaughter) at the time of the incident, but does not live there any longer. She moved to Florida. In 2019, Marina Lupa visited her daughter a few times a week, and had keys to her apartment. Konstantin Bogatyrev did not live with Maya Lupa in 2019. Maya had a dog, Xena. She shared the dog with Konstantin Bogatyrev, "they were taking turns." They had the dog before they had their daughter.

Marina Lupa testified that Xena was "very tender, very kind" and when asked "had Xena ever shown any form of aggression towards people" she said "no" [Doc 130 Page 53]. When asked to describe the incident, Marina Lupa testified that "I came out with Xena to walk her and while Xena was peeing on the grass another dog came without a collar<sup>2</sup> and tried to bite Xena so Xena was defending herself. . . the dog without the collar and no adult supervision so some people came to us and a girl ran up and picked the dog up and that's it" [*id.* Page 59]. She repeated "she came up close to Xena and tried biting her" [*id.* Page 80]. Asked if the other dog bit Xena, she said "no" and asked if Xena bit the other dog, she responded "I didn't see that" [*id.* Page 84]. She testified that plaintiff "was walking and when she saw what was happening she started running . . . she grabbed [the dog] and picked her up" [*id.* Page 120]. "she just grabbed her dog in her hands and ran in the direction of those other people. [*id.* Page 124]. Then people came closer and "started screaming very loudly, verbally assaulting me and I took Xena and left" [*id.*].

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<sup>2</sup> Corrected subsequently to "without a leash" [Page 78].

Marina Lupa was then asked if “at any time did Xena attempt to jump on that girl who you understand to be my client?” she said “no.” When asked “at any time did Xena push into that girl?” she also said “no”. Then asked “at any time did that girl fall to the ground during this incident?” she said “no” [*id.* Page 92]. Again, asked “at any time did Xena make contact with any portion of that girl?” she said “no”.

Plaintiff next provides her dog’s veterinary records [Doc 131], which are not in admissible form. The court notes that a veterinarian cannot affirm pursuant to CPLR 2106, not that this report is affirmed. The record for the “ER” visit at BluePearl indicates that they referred her to her vet for care of a “traumatic laceration.” She brought the dog to her vet in the morning. There are photos.

Next, plaintiff provides her medical record for her visit to Dr. Ratsenberg on 7/29/19. It is not in admissible form and was not considered.

Finally, plaintiff provides the ambulance call report for 7/29/19. It says her primary complaint is shoulder dislocation, and they took her from her doctor’s office to Coney Island Hospital.

Movants submit a reply affirmation. Counsel avers that the motion is not premature, and that while “the self-serving affidavits of plaintiff’s parents must be disregarded,” and “the testimony of defendants Maya Lupa and Konstantin Bogatyrev is not self-serving as it is based on their personal observations of Xena.” He points out that Ms. Shulman “does not annex any photos or medical documentation of the allegedly vicious prior attack.” Counsel further avers that the veterinary records for her dog do not establish that it was Xena who bit plaintiff’s dog. Or that his clients were aware of any vicious propensities of the dog. He concludes that plaintiff has not raised an issue of fact to overcome his motion.

### Standards for Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York*, 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept.*, 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty*

*Corp.*, 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp.*, 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; *Strychalski v Mekus*, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc.*, 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor*, 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc.*, 43 AD3d 839 [2d Dept 2007]).

### Discussion

First, the court must note that the analysis of a summary judgment motion filed by the dog owner is different than the analysis of a summary judgment motion filed by a property owner who is not the dog's owner.<sup>3</sup>

The standard applicable here is set forth in *Sattler v Passaro*, 211 AD3d 983, 984 [2d Dept 2022]: "To recover in strict liability for damages caused by a dog, a plaintiff must establish that the dog had vicious propensities and that the owner knew or should have known of the dog's vicious propensities (see *Petrone v Fernandez*, 12 NY3d 546, 550, 910 N.E.2d 993, 883 N.Y.S.2d 164; *M.B. v Hanson*, 168 AD3d 706, 708, 90 N.Y.S.3d 280). Vicious propensities include the propensity to do any act that might endanger the safety of the persons and property of others (see *Collier v Zambito*, 1 NY3d 444, 446, 807 N.E.2d 254, 775 N.Y.S.2d 205; *Drakes v Bakshi*, 175 AD3d 465, 465, 104 N.Y.S.3d 701). "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, 899 N.Y.S.2d 300; see *Drakes v Bakshi*, 175 AD3d at 466)." In another recent case,<sup>4</sup> the Second Department stated that "[i]n the context of a defendant's motion for summary judgment in a dog bite . . . case, the defendant bears an initial burden to demonstrate that, prior to the incident giving rise to the lawsuit, he or she was without knowledge that the animal possessed any vicious or dangerous propensities. Only if the

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<sup>3</sup> "To 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" (*J.D. v Golden Brick Dev. JP, LLC*, 2023 N.Y. App. Div. LEXIS 3354, \*2-3 [2d Dept], quoting *Brooks v Adell*, 211 AD3d 792, 792).

<sup>4</sup> *J.S. v. Mott*, 2023 N.Y. App. Div. LEXIS 3302, \*2-3

defendant meets this initial burden, does the burden then shift to the plaintiff to raise a triable question of fact as to whether [the] defendant knew or should have known that his or her dog had vicious propensities" (*Olsen v Campbell*, 150 AD3d 1460, 1461, 54 N.Y.S.3d 456 [3d Dept 2017] [internal quotation marks, brackets, ellipsis and citations omitted]; see *Hamlin v Sullivan*, 93 AD3d 1013, 1013, 939 N.Y.S.2d 770 [3d Dept 2012]). The proof of such vicious propensities is not limited to evidence of a prior bite, but may include a showing that the dog had been known to engage in aggressive behavior, snap, growl or bare its teeth (see *Collier v Zambito*, 1 NY3d 444, 446-447, 807 N.E.2d 254, 775 N.Y.S.2d 205 [2004]). In fact, it has been held that "[v]icious 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.* at 446 [internal quotation marks and citation omitted]; see *Hamlin v Sullivan*, 93 AD3d at 1014). Importantly, however, "normal canine behavior does not establish vicious propensities" (*Clark v Heaps*, 121 AD3d 1384, 1384, 995 N.Y.S.2d 356 [3d Dept 2014] [internal quotation marks and citations omitted])."

A defendant can establish his prima facie entitlement to judgment as a matter of law by demonstrating, through his deposition testimony, that he was not aware, nor should have been aware, that the dog had previously bitten anyone or had vicious propensities (see *Sattler v Passaro*, 211 AD3d 983, 984 [2d Dept 2022]. When he does so, and "[t]he only evidence offered by the plaintiff to demonstrate that, prior to this incident, the dog exhibited fierce or violent tendencies was inadmissible hearsay", the court found that was "insufficient, on its own, to bar summary judgment" to defendant (see *Sattler v Passaro*, 211 AD3d 983, 984, citing *Ciliotta v Ranieri*, 149 AD3d 1032, 1033, 52 N.Y.S.3d 474; *Roche v Bryant*, 81 AD3d 707, 708, 916 N.Y.S.2d 185).

It must be noted that some courts, perhaps not pleased with the heavy burden of

proving “vicious propensities” have seemingly developed an alternate analysis. When the dog’s owner knows that the dog has had “issues”, such as a dog that is described as one that “always barks and lunges at people in uniforms”, even if there has not been a prior vicious act, they hold that “an 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” (*Zicari v Buckley*, 213 AD3d 1343, 1344 [4<sup>th</sup> Dept 2023], citing *Collier v Zambito*, 1 NY3d 444, 447, 807 N.E.2d 254, 775 N.Y.S.2d 205 [2004]; see also *Xin Kai Li v Miller*, 150 AD3d 1051[2d Dept 2017]).

However, barking at strangers or passersby and other “normal canine behavior” will not support a finding of knowledge of vicious propensities. (*Brooks v Adell*, 211 AD3d 792, 793, 181 N.Y.S.3d 125 [2d Dept 2022]). Likewise, the plaintiff’s impressions and observations of the dog during the subject incident, for example, that an unleashed dog “aggressively growl[ed], bark[ed], and viciously charge[d]” at the plaintiff, does not demonstrate that the defendants knew or should have known of the dog’s alleged vicious propensities (see *Costanza v Scarlata*, 188 AD3d 1145, 1147, 132 N.Y.S.3d 844 [2d Dept 2020]). Further, the nature and severity of the attack does not demonstrate that the defendants knew or should have known of the dog’s alleged vicious propensities [*id.*].

Here, the court finds that there are too many disputed issues of fact raised by plaintiff for the court to grant defendants’ motion to dismiss the complaint as against them. The court has not been provided with the surveillance video, the veterinary records for Ms. Shulman’s dog, any evidence that Ms. Shulman complained to the management office about Xena, or any evidence from the security guard who promptly appeared at the scene, with regard to what transpired or confirming plaintiff’s claim that her dog was on a leash and/or identifying Xena as the offending dog, or that plaintiff picked up her dog and ran, as testified to by

Marina Lupa, as opposed to falling down and her dog running away, as testified to by plaintiff. Both Marina Lupa and Maya Lupa testified to unpleasant and unneighborly behavior prior to this incident on plaintiff's part and on her dogs' part, and plaintiff also testified of prior unpleasant and unneighborly behavior prior to this incident on Xena's part and on her owners' part.

To be clear, a motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Chimbo v Bolivar*, *supra*; *Benetatos v Comerford*, 78 AD3d 750, 911 NYS2d 155 [2d Dept 2010]). Therefore, viewing the evidence in the light most favorable to plaintiff, the motion must be denied.

However, the negligence claim in the complaint must be dismissed. In the complaint, the fourth cause of action is asserted against movants. It states at Paragraph 202 that the cause of action is for negligence, and then at Paragraph 203, that this cause of action is also for strict liability. To the extent that plaintiff has asserted a claim for negligence against Maya Lupa and Konstantin Bogatyrev, that claim must be dismissed. New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal (see *Cintorrino v Rowsell*, 163 AD3d 919, 919-20, 82 N.Y.S.3d 481 [2d Dept 2018]; *Xin Kai Li v Miller*, 150 AD3d 1051, 1051-52, 54 N.Y.S.3d 652 [2d Dept 2017]).

Accordingly, it is **ORDERED** that the defendants' motion is granted in part and denied in part. The caption is amended as indicated above. This constitutes the decision and order of the court.

Dated: July 21, 2023

ENTER :



Hon. Debra Silber, J.S.C.