At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of July, 2023.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice,

----------X

KUMIKO UCHIDA,

Plaintiff,

-against-

JOHN GEORGES,

Defendant.

----------X

Index No.: 513975/2019

DECISION AND ORDER

Motion Sequence #2

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion, Affirmations, and Exhibits Annexed	41-50
Affirmations (Affidavits) in Opposition and Exhibits Annexed	51-63
Reply Affirmation and Exhibits Attached	64-67

After a review of the papers and oral argument, the Court finds as follows:

On December 9, 2018, Mickey, a ten-month old, 65-pound, male, unneutered, pitbull/bulldog mix ("Mickey"), owned by defendant John Georges (the "Defendant"), bit the left hand (specifically, the second and third metacarpal bones, as well as the first webspace) of plaintiff Kumiko Uchida (the "Plaintiff"). Emergency surgery to debride the Plaintiff's laceration wounds (with the placement of drainage tubes) was performed later the same day. She was then hospitalized for a course of intravenous antibiotics for the dog-bite-caused cellulitis until December 13, 2018. An approximately one-millimeter sliver of Mickey's tooth had lodged in the Plaintiff's left hand after her discharge from the hospital but was dislodged following the outpatient physical therapy and the application of other non-surgical treatment modalities to her left hand.

On June 24, 2019, the Plaintiff commenced the instant action sounding in strict liability. The Defendant joined issue. After the Defendant's initial motion for summary judgment had been marked off, he renewed it by serving the instant motion.

"The sole means of recovery of damages for injuries caused by a dog bite . . . is upon a theory of strict liability." *King v. Hoffman*, 178 AD3d 906, 908 [2d Dept 2019]. "To recover in strict liability in tort 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." *Curbelo v. Walker*, 81 AD3d 772, 773 [2d Dept 2011]. "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 2010]. "Knowledge of [a dog's] vicious propensities may also be discerned, by a jury, from the nature and result of the attack." *Matthew H. v. County of Nassau*, 131 AD3d 135, 148 [2d Dept 2015]. Further, "[a] known tendency to attack others, *even in playfulness*, as in the case of the overly friendly large dog with a propensity for enthusiastic jumping up on visitors, will be enough to make the defendant liable for damages resulting from such an act." *Anderson v. Carduner*, 279 AD2d 369, 369-370 [1st Dept 2001] [internal quotation marks omitted; emphasis added].

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should 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], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The party seeking the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2d Dept 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2d Dept 1989]. Failure on the part of the movant to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

On a motion for summary judgment, the defendant has the initial burden of proving that he (or she) did not know, or have reason to know, that the dog possessed vicious or dangerous propensities. *See Christian v. Petco Animal Supplies Stores, Inc.*, 54 AD3d 707, 708 [2d Dept 2008].

Here, the Defendant has established his *prima facie* entitlement to judgment as a matter of law by demonstrating, by way of his pretrial testimony, that Mickey – an affectionate, excitable, and very curious dog who liked to "mouth" other dogs – lacked vicious propensities (at least, in the Defendant's view) and that, in any event, he neither knew nor should have known of any such propensities. *See e.g. Kennedy v. Brooklyn Hosp., LLC*, ___ AD3d ___, 2023 NY Slip Op 03456, *1 [2d Dept 2023]; *Lipinsky v. Yarusso*, 164 AD3d 896, 897 [2d Dept 2018]; *Cintorrino v. Rowsell*, 163 AD3d 919, 920 [2d Dept 2018]).

In opposition to the motion, however, the Plaintiff has raised triable issues of fact as to whether Mickey had vicious propensities, and whether the Defendant knew or should have known of them. *See Lipinsky*, 164 AD3d at 897; *Feit v. Wehrli*, 67 AD3d 729, 729-730 [2d Dept 2009]. According to the affidavit of the Plaintiff's neighbor Simone Dinnerstein, submitted in opposition to the motion, she had observed, prior to the incident, that: (1) Mickey had been aggressive toward (or wanted to attack) her dog (a 60-pound Old English sheepdog) on several occasions; (2) the Defendant had volunteered to remove Mickey (on account of its aggressive behavior toward Ms. Dinnerstein's dog) from the dog park which she and her dog were then visiting; (3) Ms. Dinnerstein, while walking her dog, had crossed the street (at least, once) to avoid encountering Mickey; and (4) the Defendant lacked physical strength to control Mickey. In

addition, according to the affidavits of two eyewitnesses to the incident – Phillip Costellano and Christie Ann Reynolds – submitted in further opposition to the motion: (1) Mickey, suddenly and without provocation, ran toward and latched onto the left ear (and/or side and jowls) of the Plaintiff's dog (a small female bulldog named "Ushi") as soon as Plaintiff and Ushi entered the dog park; (2) Mickey maintained his bite grip on Ushi, as the Plaintiff and Defendant were struggling to release her; (3) as soon as Mickey released Ushi, his jaws closed on – and bit into – the Plaintiff's left hand; and (4) it took a significant collective effort (including striking Mickey's snout with a stick) by the Plaintiff, the Defendant, and one or both of the two eyewitnesses to release the vertical grip of Mickey's jaws on the Plaintiff's left hand. Construing the foregoing affidavits in a light most favorable to the Plaintiff and resolving all reasonable inferences in her favor, such affidavits – as supplemented by the Plaintiff's pretrial testimony, her medical records, and the pre-operative photographs of her alleged injuries – are sufficient to raise a triable issue of fact as to whether the Defendant had actual and/or constructive notice of Mickey's vicious propensities. "Viewing this evidence in the light most favorable to the plaintiffs and resolving all reasonable inferences in their favor (*see Derise v Jaak 773, Inc.*, 127 AD3d 1011, 1011 [2015]), the evidence was sufficient to raise a triable issue of fact as to whether the defendants knew or should have known that their dog had vicious propensities." *I. A. v. Mejia*, 174 AD3d 770, 772, 105 N.Y.S.3d 103 [2d Dept 2019]; *Provorse v. Curtis*, 288 AD2d 832, 832 [4th Dept 2001]).

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion (motion sequence #2) for summary judgment is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

4