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| Ibragimova v Yakubova |
| 2023 NY Slip Op 35089(U) |
| August 28, 2023 |
| Supreme Court, Queens County |
| Docket Number: Index No. 703049/2021 |
| Judge: Denise N. Johnson |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENISE N. JOHNSON IAS Part 11
Justice



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| NEKADAM IBRAGIMOVA, ILYA IBRAGIMOV | | Index No.: 703049/2021 |
| | Plaintiff(s), | |
| | | Motion Date: 5/8/2023 |
| - and - | | Motion Cal. No.: 8 |
| | | |
| LARISA YAKUBOVA | | Motion Seq. No: 1 |
| | Defendant(s). | |

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The following papers numbered EF 29-63 read on this motion by Defendant LARISA YAKUBOVA in this action for an order pursuant to CPLR § 3212 granting Defendant summary judgment and dismissal of the complaint: and on this cross-motion by Plaintiffs NEKADAM IBRAGIMOVA, ILYA IBRAGIMOV pursuant to § CPLR 3212, for an Order granting summary judgment against the defendant on the issue of liability and Pursuant to 3042(b), for an Order granting Plaintiff leave to Amend her Bill of Particulars.

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| | Papers <u>Numbered</u> |
| Notice of Motion – Affirmation – Statement of Material Facts – Exhibits – Service | EF 29-40 |
| Notice of Cross-Motion – Affirmation – Statement of Material Facts – Exhibits – Service | EF 41-58 |
| Affirmation in Opposition to Cross-Motion | EF 59-60 |
| Reply Affirmation | EF 61-62 |
| Reply Affirmation to Cross Motion | EF 63 |

Upon the foregoing papers it is **ORDERED** that as follows:

This is action to recover for personal injuries allegedly sustained from an accident on the premises known as 188-16 Aberdeen Road, Jamaica, New York (“subject premises”). The action was commenced with the filing of a summons and complaint on February 9, 2021. Defendant now moves for an order pursuant to CPLR § 3212 granting Defendant summary

Judgment and dismissing the complaint. Plaintiff cross moves for an order pursuant to CPLR § 3212 granting Plaintiffs summary judgment on the issue of liability and an order pursuant to CPLR § 3042[b], for an Order granting Plaintiff leave to Amend her Bill of Particulars; .

With regard to Defendant's Motion for Summary Judgment, effective February 1, 2021, the Uniform Civil Rules for the Supreme court and the County Court impose word count limits for affidavits, affirmations, briefs, and memoranda of law submitted on motions (*see* 22 NYCRR §202.8-b[a]). Each such document must include a page at the end containing a certification of compliance by the attorney has filed the document (*see* 22 NYCRR §202.8-b[c]). Movant's affirmation in support of this application fails to comply with these requirements.

Accordingly, the above-referenced motion is DENIED without prejudice with leave to renew.

Plaintiffs now cross move, pursuant to CPLR §3212, for an order of summary judgment in favor of Plaintiffs on the issue of liability. It is well-settled that the proponent of a summary judgment motion must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion. CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see, Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]). Summary judgment shall be granted

only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*see, Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]). “When such a showing has been made by the movant, then to defeat summary judgment ‘the opposing party must show facts sufficient to require a trial of any issue of fact’”(*Khorana v Stop & Shop Supermarket Co. LLC*, 2012 NY Slip Op 31878[U] [Sup Ct, Nassau County 2012]). In support of their cross-motion Plaintiffs offer, inter alia, the Pleadings, Plaintiff Nekadam Ibragimova’s Deposition, Defendant’s deposition transcript, photographs.

Here, Plaintiff, who was working as a home health aide in the Defendant’s home at the time, alleges that on the date of the incident she arrived at the home in the morning as was her routine. It is undisputed that Plaintiff was a home health aide to Defendant’s elderly mother and was employed in that position for approximately 5-6 years. The location is private house with both a front entrance and a side entrance. The side entrance is on a porch that connects to the backyard of the home. On the porch there is a dog-gate Plaintiff further alleges that she usually enters the home through the front entrance, but it was closed on this date. Plaintiff asserts that she attempted to enter the home through the side entrance instead. Plaintiff testified in a deposition taken on July 14, 2021, that she \uses the side door on occasions where she cannot gain entry through the front door. She further avers that as she was trying to enter the home through a side entrance the Defendant’s dog that she is fearful of came running at her and she fell over a closed dog-gate at the top of the stairs on the proch. Plaintiff testified that she is very afraid of the dog and she that she expressed her fears to her client, the Defendants elderly mother on numerous occasions. She adds that Defendant herself was aware of the Plaintiff’s fear of the dog. According to Plaintiff, the

injury occurred while trying to get into the home and get away from the dog however, Plaintiff fails to show a nexus between her injuries and the behavior of the dog.

At issue here is whether the dog-gate was the cause of Plaintiff's injury. Plaintiff alleges that her falling over the dog-gate was the cause of her injuries. It is undisputed by the parties that the dog-gate that allegedly caused Plaintiff's injuries has been in place for approximately two years prior to the accident. It is also undisputed that there were no witnesses to the incident. There is a discrepancy about where, if any place, the dog-gate was at the time of the accident. Defendant testified in her deposition which was held on February 16, 2022, that while she was not present at the time of the accident that she was advised by Plaintiff that she fell while taking out garbage. Defendant offers a different explanation of how Plaintiff sustained her alleged injury Defendant further testified and alleges that she was not made aware of the accident until 4 months after the alleged accident occurred. Defendant avers that she was not aware of Plaintiff's fear of the dog. Defendant purports that the Plaintiff advised her of the accident at the time that she also advised her that she was no longer going to be working. Defendant offers these alternative issues of fact in admissible form through deposition testimony of the Defendant. As there is clearly a dispute of the facts regarding the condition of the dog-gate, such as where the dog-gate was at the time of the incident, whether the dog-gate was open on the date of the incident, whether the dog-gate being in place created an inherently dangerous condition, and whether the accident even occurred as stated, Defendants have successfully raised a material issue of triable fact in opposition to Plaintiff's motion.

Plaintiff also moves for leave to Amend her Bill of Particulars pursuant to CPLR § 3042[b]. CPLR § 3042[b] authorizes that in "any action or proceeding in a court in which a note of issue is required to be filed, a party may amend the bill of particulars once as of course prior to the filing

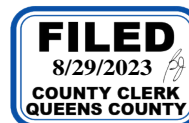
of a note of issue”. Here, the verified bill of particulars was filed March 16, 2021 and the note of issue was filed January 4, 2023, however Plaintiff filed the motion seeking to amend 20 days after the filing of the note of issue on January 24, 2023. Leave to amend the bill of particulars should be freely given in the absence of prejudice or surprise to the opposing party (see *Barrera v City of New York*, 265 AD2d 516 [2d Dept 1999]; *Smith v Plaza Transp. Ambulance Serv.*, 243 A.D.2d 555, 665 N.Y.S.2d 513 [1997]; *Kyong Hi Wohn v County of Suffolk*, 237 A.D.2d 412, 654 N.Y.S.2d 826 [1997]; *Volpe v Good Samaritan Hosp.*, 213 A.D.2d 398, 623 N.Y.S.2d 330 [1995]). Here, Plaintiff seeks to amend the BP to add a new theory of strict liability regarding a dog attack into the case arguing that the Defendant’s dog had vicious propensities, however Plaintiff fails to show that a causal link between the injuries sustained, and the dog’s behavior exists. Therefore, it is

ORDERED, that Plaintiff’s cross-motion for an order of summary judgment pursuant to CPLR § 3212 on the issue of liability is DENIED. It is further,

ORDERED, that Plaintiff’s motion to seeking leave to amend the bill of particulars as to numbered paragraphs # 4 and # 14 is denied.

The foregoing shall constitute the decision and order of this court.

Dated: August 28, 2023



Denise N. Johnson

DENISE N. JOHNSON
J.S.C.