

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
Justice

PART 13

RUTH REIF and DAVID REIF,  
Plaintiffs,

INDEX NO. 154543/2016

- against -

MOTION DATE 11/29/17

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

ROBERT LEFF,  
Defendant.

The following papers, numbered 1 to 8 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3; 4 - 6</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7; 8</u>
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that Defendant's motion and Plaintiffs' cross-motion for summary judgment pursuant to CPLR §3212, are denied.

On August 23, 2014 at around 9:00am Defendant's dog "Diesel," a four-year old American Bulldog, bit Plaintiff Ruth Reif on Ocean Beach, Wainscott, East Hampton, New York, causing serious injuries. Two alternative versions of how the incident began has been given. Plaintiffs allege that Diesel unprovoked attacked Ruth Reif's brother's (Samuel Yanovich) dog "Rocky," and held Rocky's head in his mouth for "at least three minutes" causing Mrs. Reif to fear Diesel had killed him (Moving Papers Ex. D). Eventually the owners were able to successfully free Rocky from Diesel's grip. It was at this point Mrs. Reif realized she was injured and substantially bleeding because she had put her arm in Diesel's mouth when attempting to release Rocky (Moving Papers Ex. D, Opposition Papers Ex. C: Affirmation of Samuel Yanovich). The Defendant testified that Diesel was watching Rocky play with another dog from about fifty (50) yards away and upon seeing Rocky attacking the dog, Diesel ran over to stop the fight by grabbing Rocky on the neck with his teeth (Moving Papers Ex. B). On May 27, 2016 the Plaintiffs commenced this action to recover damages for the personal injuries Mrs. Reif sustained.

The Defendant now moves for summary judgment pursuant to CPLR §3212. The Plaintiffs oppose the motion and cross-move for summary judgment on liability.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (SSBS Realty Corp. v Public Service Mut. Ins. Co., 253 AD2d 583, 677 NYS2d 136 [1<sup>st</sup> Dept. 1998]). It is axiomatic that summary judgment is a drastic remedy and

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (*Epstein v Scally*, 99 AD2d 713, 472 NYS2d 318 [1984]). Summary Judgment is “issue finding” not “issue determination” (*Id*).

The owner of a domestic animal who either knows or should have known of that 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, 775 NYS2d 205, 807 NE2d 254 [2004]). “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, 720 NYS2d 18 [1<sup>st</sup> Dept. 2001]). Knowledge of vicious propensities may be established by proof of prior acts of a similar kind of which the owner had notice (*Collier, supra*). If such knowledge is established, an owner faces strict liability for the harm the animal causes as a result of those propensities (*Strunk v Zoltanski*, 62 NY2d 572, 468 NE2d 13, 479 NYS2d 175 [1984]).

The Defendant fails to make a prima facie showing of entitlement to judgment as a matter of law. He does put forth evidence that he did not know or should have known of Diesel's alleged vicious propensities. In his deposition, he testified of being the owner of Diesel for twenty-three (23) days after adoption (*Moving Papers Ex. B*). The shelter told him the previous owners gave Diesel up solely because he did not get along with the family's cat but was nonetheless friendly (*Id*). He further testified that when taking Diesel for walks, including unleashed, Diesel would be cordial or uninterested with other people and dogs, and never had any fights with other dogs (*Id*).

However, a material issue of fact remains - how the alleged incident began. An attack that is severe and unprovoked is an indicia of vicious propensities (*Moriano v Schmidt*, 133 AD2d 72, 518 NYS2d 416 [2<sup>nd</sup> Dept. 1987]). The parties have testified to alternative versions of how Diesel ended up biting Rocky's head/neck and causing Mrs. Reif's injuries. The different versions of event raise a material factual issues for the jury, not the Court. Defendant's motion for summary judgment must be denied.

Likewise, Plaintiffs' cross-motion for summary judgment must be denied. Plaintiffs contend that summary judgment on liability must be granted solely because the Defendant twice conceded “full responsibility” for the incident, first to the animal control officer and then to Mrs. Reif. However, animal bite cases proceed under the theory of strict liability meaning the apparent negligence of an owner is not an issue (*Morse v Colombo*, 31 AD3d 916, 819 NYS2d 162 [3<sup>rd</sup> Dept. 2006]).

**Accordingly, it is ORDERED, that Defendant's motion and Plaintiff's cross-motion for summary judgment pursuant to CPLR §3212, are denied.**

ENTER:

**MANUEL J. MENDEZ  
J.S.C.**

Dated: December 6, 2017

  
\_\_\_\_\_  
Manuel J. Mendez,  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST                       REFERENCE