

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24  
Justice

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STEPHANIE YABONI and SALVINA MARTINEZ,

Index No: 20873/10

Plaintiffs,

Motion

-against-

Dated: March 18, 2013

OPI XXV, LLC, ET AL.,

m# 3 & 4

Defendants.

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The following papers numbered 1 to 15 read on this motion by defendant Jodi Berger, individually and d/b/a Jodi's K-9 Care Dog Walking and Dog Sitting for summary judgment dismissing the complaint insofar as asserted against her (No. 3); and separate motion by defendants QPI-XXV, LLC, Vantage Properties, LLC and Vantage Management Services, LLC for summary judgment dismissing the complaint insofar as asserted against them (No. 4).

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Plaintiffs' Memorandum of Law	

Upon the foregoing papers it is ordered that this motion by defendant Jodi Berger, individually and d/b/a Jodi's K-9 Care Dog Walking and Dog Sitting ("Berger") for summary judgment and separate motion by defendants QPI-XXV, LLC, Vantage Properties, LLC and Vantage Management Services, LLC ("Vantage") for summary judgment are jointly decided as follows:

At the outset, the court notes that pursuant to a short form order dated May 23, 2013, this court granted a motion by defendant Serafin Rivera for summary judgment and dismissed the complaint as against defendant Serafin Rivera.

The complaint alleges that plaintiff Stephanie Yaboni suffered serious injuries when she was attacked by a dog owned by

Serafin Rivera, on May 8, 2010 at her premises, an apartment building located at 98-30 67<sup>th</sup> Avenue in Queens County. The complaint further alleges that a dog owned by plaintiff Salvina Martinez, also a resident of the premises, was killed as a result of the same attack by Rivera's dog, "Chunky", a pitbull-mix. Defendant QPI, XXV, LLC is the owner of the subject premises, and the Vantage defendants are the Managing Agents of the property. Defendant Berger was a resident of the subject premises and operated a dog walking and sitting business out of her apartment. At the time of the incident, defendant Berger was caring for Chunky for five days for Rivera, who did not reside at the subject premises.

The facts as set forth in the papers herein allege that right before the incident, defendant Berger was waiting for the elevator to take Chunky for a walk at approximately 10:30 P.M. Plaintiff Stephanie Yaboni was already in the elevator with her dog, "Dudley", a miniature dachshund, as well as a dog owned by plaintiff Salvina Martinez, "Coco", a chihuahua. Yaboni was walking Coco for Martinez. As Berger opened the elevator door, Chunky lunged into the elevator and attacked Dudley. Plaintiff Yaboni and Defendant Berger attempted to pull the dogs apart. After the elevator doors opened in the lobby, all three dogs ran out, and Chunky then attacked Coco. Plaintiff Yaboni sustained injuries during the attack. Coco later died as a result of the incident.

Plaintiff Yaboni commenced this action to recover damages for her physical injuries as a result of the incident. Plaintiff Martinez also seeks to recover for her emotional injuries incurred as a result of the death of her dog, Coco. Defendants now move for summary judgment dismissing the complaint.

The motion by defendant QPI-XXV, LLC and the Vantage defendants for summary judgment is granted. 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. (*Sarno v Kelly*, 78 AD3d 1157, 1157 [2d Dept 2010]; *Ali v Weigand*, 37 AD3d 628, 628-629 [2d Dept 2007]; *Young v Tirrell*, 1 AD3d 509, 509 [2d Dept 2003].) Vicious propensities include the propensity to do any act that might endanger the safety of the persons or property of others in a given situation. (*Collier v Zambito*, 1 NY3d 444, 446 [2004].) A party has been found to be aware of a dog's vicious propensities where there is evidence that a dog was known to

growl, snap or bare its teeth. (*Collier v Zambito*, 1 NY3d at 447.) Other evidence demonstrating vicious propensities include a prior attack, the manner in which the dog was restrained, the fact that the dog was kept as a guard dog, and a proclivity to act in a way that puts others at risk of harm. (*Bard v Jahnke*, 6 NY3d 592, 597 [2006]; *Feit v Wehrli*, 67 AD3d 729, 729 [2d Dept 2009].)

In the case at bar, the Vantage defendants and defendant QPI-XXV made a prima facie showing of their entitlement to judgment as a matter of law. These defendants demonstrated that they were not aware that Chunky was on their premises, or even if they were, that they were on notice of any vicious propensities by Chunky. At his deposition, Ivarionex Guerra-Hart, the superintendent of the premises, testified that he was never aware of any complaints regarding defendant Berger and the dogs she would walk. He further stated that there were never any complaints that any of the dogs Berger walked had jumped at, or tried to attack someone. Plaintiffs, in opposition, fail to submit any admissible evidence raising an issue of fact that the Vantage defendants had notice of vicious propensities by Chunky.

To the extent that plaintiffs seek to hold the Vantage defendants and defendant QPI-XXV liable on a negligence theory, such claim is without merit. Where harm is inflicted by a domestic animal, the owner's liability is determined under the principles of strict liability. (*Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Polman v Tersillo*, 65 AD3d 1207, 1209 [2d Dept 2009].) The court notes that very recently the Court of Appeals found that this general rule did not bar a negligence claim in the case of a farm animal that had strayed from the property where it was kept. (*Hastings v Sauve*, \_\_\_ NY3d \_\_\_, 2013 NY Slip Op 03120 [2013].) In *Hastings*, the plaintiff was injured when the van she was driving hit a cow on a public road. There was evidence that the fence that separated the defendants' property from the road was overgrown and in bad repair. The Court of Appeals noted that the case did not involve aggressive or threatening behavior by an animal as is normally the case in actions brought to recover for injuries inflicted by a domestic animal. Rather, it involved a farm animal that was allegedly permitted to wander off the property through the negligence of the owner. The Court reasoned that application of the strict liability rule in a case such as this would serve to "immunize defendants who take little or no care to keep their livestock out of the roadway or off of other people's property." Clearly the facts of the instant case are completely distinguishable from *Hastings*. To permit a negligence claim on the facts before this court would greatly expand the holding of *Hastings* from the

limited circumstances discussed therein.

With respect to the motion by defendant Berger for summary judgment, said defendant made a prima facie showing of her entitlement to judgment as a matter of law. Defendant Berger submits admissible evidence that she was not aware of any vicious propensities by Chunky. She stated that she cared for Chunky for approximately 1½ years and walked her approximately 55-60 times. She stated that Chunky never behaved in a violent or aggressive manner. She stated that Chunky never growled, showed her teeth or behaved in any manner that would arouse concern. Berger further stated that when she would take Chunky on walks, Chunky was always friendly with other people and other dogs.

In opposition, plaintiffs submit sufficient evidence raising a triable issue of fact as to whether defendant Berger had notice of any vicious propensities of Chunky. In her deposition, plaintiff Martinez testified that the day before the incident, while she was walking her dog, she saw defendant Berger walking Chunky. She testified that Chunky lunged at them and growled. Plaintiff Martinez further testified that Berger had to try to restrain Chunky at that time. Such testimony is sufficient to raise an issue to Berger's knowledge of vicious propensities by Chunky.

Plaintiff Martinez also seeks to recover for the emotional injuries she suffered as a result of the death of her dog. However, under New York law, pets are treated as personal property, and a claim for emotional distress will not lie for the loss of a pet, as tragic as it may be. (*Feger v Warwick Animal Shelter*, 29 AD3d 515, 516 [2d Dept 2006]; *Schrage v Hatzlacha Cab Corp.*, 13 AD3d 150, 150 [1st Dept 2004]; *Jason v Parks*, 224 AD2d 494, 495 [2d Dept 1996].)

Accordingly, this motion by defendant Jodi Berger, individually and d/b/a Jodi's K-9 Care Dog Walking and Dog Sitting for summary judgment (No. 3) is denied.

The motion by defendants QPI-XXV, LLC, Vantage Properties, LLC and Vantage Management Services, LLC for summary judgment is granted, and the complaint against defendants QPI-XXV, LLC, Vantage Properties, LLC and Vantage Management Services, LLC is dismissed, and the action is severed and continued as against the remaining defendant.

Date: May 24, 2013

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AUGUSTUS C. AGATE, J.S.C.

