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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

ALICE TIGHE,

Plaintiff,

- against -

NORTH SHORE ANIMAL LEAGUE AMERICA,

Defendant.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 600080/13

MOTION SUBMISSION
DATE: 8/8/14

MOTION SEQUENCE
NO. 2

The following papers read on this motion:

Notice of Motion and Affidavits....................	X
Memorandum of Law in Support of Motion...	X
Affirmation in Opposition..............................	X
Reply Affirmation...	X

The defendant, North Shore Animal League America, (hereinafter referred to as "North Shore Animal League"), moves for an order granting the defendant summary judgment. The defendant submits a Memorandum of Law in support of the motion. The plaintiff submits opposition. The defendant submits a reply affirmation.

The plaintiff initiated this action for personal injuries sustained on September 3, 2012 as a result of a dog bite. The plaintiff adopted a black Labrador Retriever she named "Lucky" from the defendant at the defendant's facility located in Port Washington, New York on May 19, 2012. The plaintiff claims she sustained injuries on September 13, 2012 when Lucky bit her in the face when she leaned toward Lucky and was rubbing his belly.

The plaintiff provides that North Shore Animal League did not tell the plaintiff that Lucky was adopted twice before and returned. More specifically, she was not informed that Lucky had been returned the first time after three months because the family's babysitter disliked him and threatened to quit, or that he was returned the second time in less than 30 days of his adoption because he had bit a child in the face. The plaintiff admitted, however, that she did not inquire about Lucky's history as she did not think that there was any need to do so. The plaintiff testified, and has attested in opposition to this motion, that she would not have adopted Lucky had she been informed of his history.

The defendant maintains that it is a nonprofit non-kill animal rescue group that has provided adoption services, counseling, pet behavior training and medical care for over fifty years. As Lucky had been at the shelter for more than one month, the plaintiff was not charged an adoption fee. The defendant provides that when Lucky was returned the second time, a bite hold report was created, Lucky was segregated for the statutorily mandated ten days for observation and medical assessment, and evaluated. The defendant maintains that Lucky's behavior was hyper but not aggressive and the trainers determined that Lucky did not exhibit any aggressive personality traits and therefore, was released for adoption. The defendant submits that the plaintiff did not contact the defendant at any time after Lucky's adoption, or request any of the post-adoption counseling offered to owners who may have difficultly with their dog's behavior.

The Pet Hold Report prepared by North Shore Animal League on September 26, 2011, when Lucky was returned the second time, reflects that Lucky had been returned as an adopted dog "because he bit daughter in the face." It also states "see AR [adoption return] aggressive." The Adoption Return Aggressive Bite Hold Report, prepared by North Shore Animal League, dated September 26, 2011, also reflects that Lucky bit the adopter's 12 year old daughter in the face the day before. That report details the incident as follows: "[D]aughter walked down the stairs & into the living room where the dog was - she said 'hey Jet' and he lunged up out of nowhere & bit her in the face - pushed her to the ground & other dog got him off of her." The report also notes that this was not the first time that Lucky exhibited this behavior, however, the entry for details was left blank. An employee of North Shore Animal League admitted at her examination-before-trial that the kennel card, which was placed on Lucky's cage at North Shore Animal League, should have been checked under "A/R" to indicate that Lucky had been returned following an adoption. It cannot be determined if the kennel card was checked off because the kennel cards are discarded once a dog is adopted. Nevertheless, North Shore Animal League's employee testified at her examination-before-trial that anything checked off on the kennel card should be explained to a potential adopter. The plaintiff testified at her examination-before-trial that she was not told about Lucky's prior adoptions and returns.

The plaintiff, by way complaint, alleges causes of action sounding in intentional infliction of emotional distress, negligence, and breach of implied warranty of merchantability. The plaintiff also seeks punitive damages. North Shore Animal League seeks dismissal of the complaint on the grounds that it did not own Lucky when the incident occurred and therefore did not have control over him, it did not have sufficient knowledge of Lucky's vicious propensities, and that the plaintiff's claims are barred by the adoption agreement.

The adoption agreement executed by the plaintiff when she adopted Lucky provides:

> "ADOPTER IS FULLY AWARE THAT [North Shore Animal League] AMERICA MAKES NO GUARANTEES WHATSOEVER AS TO THE HEALTH, TEMPERAMENT, MENTAL DISPOSITION AND TRAINING OF THE ANIMAL."

"ADOPTER HEREBY FULLY AND COMPLETELY RELEASES [North Shore Animal League], AMERICA, ITS AGENTS SERVANTS AND EMPLOYEES FROM ...ANY CLAIM, CAUSE OF ACTION OR LIABILITY FOR ANY INJURY OR DAMAGE TO PERSONS OR PROPERTY WHICH MAY BE CAUSED BY THE ANIMAL AND TO HOLD [North Shore Animal League] AMERICA HARMLESS AGAINST ALL CLAIMS...FOR ANY INJURY OR DAMAGE TO PERSONS OR PROPERTY CAUSED BY THE ANIMAL...."

The adoption agreement also provides that the "adopter assumes full responsibility for this animal for the animal's entire lifetime and fully understands that [NORTH SHORE ANIMAL LEAGUE] is placing the animal for adoption on this condition." Via the adoption agreement, the plaintiff agreed, *inter alia*, to provide Lucky with proper and sufficient food, water, shelter and kind and careful treatment, to take him to the veterinarian, to obtain proper vaccinations, to license him, to provide proper humane training, to allow North Shore Animal League to investigate her treatment of him, and to remove him should it be dissatisfied with his living conditions. Finally, it provides "[t]his agreement contains no express or implied warranties of merchantability or express or implied warranties that the animal adopted by the Adopter is fit for any particular purpose." As already provided, the plaintiff was not charged a fee in connection with her adoption of Lucky because Lucky had been there for over a month.

"A party moving for summary judgment is required to 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" (*Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324; see also CPLR 3212[b]). The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v. Restani Constr. Corp.*, 18 NY3d 499). "Where the moving party fails to meet [its] burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment." (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh,* 22 NY3d 470, citing *Vega v. Restani Constr. Corp.*, supra at 503). "Indeed, the moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v. Rabizadeh,* supra at 475, citing *Vega v. Restani Constr. Corp.*, supra at 503).

In seeking dismissal of the complaint on the grounds that it did not own Lucky at the time of the underlying incident, North Shore Animal League relies on *Frank v Animal Haven, Inc.*,107 AD3d 574. In that case, the plaintiff sought to recover of Animal Haven as well as Skimbirauskas, the individual who had adopted the allegedly vicious dog named Jackpot from Animal Haven, for injuries suffered when Jackpot bit her. While the plaintiff alleged that Animal Haven was aware or should have been aware of Jackpot's vicious propensities, the complaint against it was dismissed on the ground that it did not own Jackpot when he bit the plaintiff and it therefore lacked a duty to him. In *Browne v. Town of Hempstead*, 110 AD2d 102, the Appellate Division held that it was "not prepared to hold that the town, in discharging its governmental duty to maintain a dog pound, in the course of which it takes in stray dogs and places them for adoption, is liable for monetary damages

to a third person bitten by such dog after custody has been surrendered to the adopting party...(emphasis added)." Neither the Appellate Division's decision in *Browne, supra,* nor the trial court's decision in *Frank v Animal Haven, Inc., supra,* refer to a claim by the party who adopted a dog for failing to disclose the dog's vicious propensities. In fact, in *Browne v. Town of Hempstead, supra*, the Appellate Division noted, albeit in dicta, that "[i]t may well be that [the adopter], as the person who had entered into a relationship with the town's [animal shelter] pursuant to which he adopted the dog in question and assumed responsibility for its conduct, was owed a special duty by the town to be warned of any dangerous propensities known to it, in order that he could take adequate precautions to protect himself and others." The court's dismissal of the complaint in *Frank v Animal Haven, Inc., supra*, does not apply here.

North Shore Animal League's argument that the complaint should be dismissed on the ground that it was not sufficiently aware that Lucky had vicious propensities fails. The plaintiff has not sought to impose liability for her injury on North Shore Animal League based solely on Lucky's vicious propensities. It is not disputed that when Lucky bit the plaintiff, North Shore Animal League no longer owned him and liability cannot be imposed on it on those grounds. Rather, the plaintiff relies on a duty to disclose information of this nature to potential adopters and to hold North Shore Animal League responsible based upon its failure to do so.

Additionally, North Shore Animal League's reliance on the release in the parties' adoption agreement also fails. "Generally, 'a valid release that is clear and unambiguous on its face constitutes a complete bar to an action on a claim which is the subject of the release absent fraudulent inducement, fraudulent concealment, misrepresentation, mutual mistake or duress'. " (*Orangetown Home Improvements, LLC v Kiernan,* 84 AD3d 902, citing *Global Precast, Inc. v Stonewall Contr. Corp.,* 78 AD3d 432). "A cause of action sounding in fraud must allege that the defendant knowingly misrepresented or concealed a material fact for the purpose of inducing another party to rely upon it, and that the other party justifiably relied upon such misrepresentation or concealment to his or her own detriment." (*Schwatka v. Super Millwork, Inc.*, 106 AD3d 897 citing *Lama Holding Co. v Smith Barney,* 88 NY2d 413; *Channel Master Corp. v Aluminium Ltd. Sales,* 4 NY2d 403; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914; *Colasacco v Robert E. Lawrence Real Estate*, 68 AD3d 706). "A cause of action to recover damages for fraudulent concealment requires, in addition to allegations of scienter, reliance, and damages, an allegation that the defendant had a duty to disclose material information and that it failed to do so." (*High Tides, LLC v DeMichele*, 88 AD3d 954; *Schwatka v. Super Millwork, Inc.*, supra at 900, citing *Consolidated Bus Tr., Inc. v Treiber Group, LLC,* 97 AD3d 778). "A duty to disclose may arise where there is a fiduciary or confidential relationship, or one party's superior knowledge of essential facts renders nondisclosure inherently unfair." (*Barrett v Freifeld,* 77 AD3d 600, citing *Barrett v Freifeld,* 64 AD3d 736). "Under the 'special facts' doctrine, a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair (quotations omitted)." (*Swersky v Dreyer & Traub,* 219 AD2d 321, citing *Beneficial Commercial Corp. v Glick Datsun,* 601 F Supp 770, quoting *Chiarella v United States,* 445 US 222; *Aaron Ferer & Sons v Chase Manhattan Bank,* 731 F2d 112). In advancing a claim sounding in fraudulent concealment, a party may not rely on

matters alleged to have been withheld which could have been discovered through the exercise of ordinarily diligence. (*Barrett v Freifeld, supra* at 602, citing *National Union Fire Ins. Co. of Pittsburgh, Pa. v Red Apple Group,* 273 AD2d 140; *Auchincloss v Allen,* 211 AD2d 417).

Here, there is an issue of fact as to whether North Shore Animal League engaged in concealed fraud in procuring the plaintiff's release. (*Pettis v. Haag*, 84 AD3d 1553). Not only did the plaintiff testify that she was not informed of Lucky's history of biting, she was not informed of the fact that he had been returned twice in accordance with normal protocol at North Shore Animal League. Likewise, at issue is whether the defendant's conduct arises to the level of punitive damages. "An award of punitive damages is warranted where the conduct of the party being held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness'. " (*Pellegrini v. Richmond County Ambulance Serv., Inc.*, 48 ad3D 436, citing *Buckholz v. Maple Garden Apts., LLC.*, 38 AD3d 584).

For similar reasons, the plaintiff's claim for breach of the implied warranty of merchantability is not barred by the parties' Release. Contrary to North Shore Animal League's argument, the transaction falls within the ambit of the Uniform Commercial Code. Dogs can be considered goods within Section 2-105 of the Uniform Commercial Code. (*Budd v Quinlan,*19 Misc3d 66). Furthermore, "[a] dog purchaser may recover damages pursuant to UCC Section 2-714 on the theory that the defendant breached the implied warranty of merchantability.(*Rotunda v. Haynes,* 33 Misc3d 68). A "sale" must have occurred in order to recover for breach of implied warranty of merchantability. A "sale" is defined by Section 2-106 of the Uniform Commercial Code as "the passage of title from the seller to the buyer for a price." It is not disputed that title to the dog passed to the plaintiff and the lack of a fee does not negate the existence of a price. "The words 'sell' and 'sale,' as ordinarily used, mean a transfer of property for a valuable consideration....Under this definition barter is classed with sale." (*Garfield Real Estate Co. v. Dennis*, 167 NYS 43, citing Bogert, Sale of Goods, p. 2). A sale under the Uniform Commercial Code is not confined to a transfer of property for a pecuniary consideration. Here, the plaintiff assumed a wealth of responsibility and non-delegable duties in adopting the dog which suffice to serve as a price.

Warranties of merchantability and fitness for use, which are implied by Uniform Commercial Code §§ 2–314 and 2–315, may be excluded or modified pursuant to Uniform Commercial Code § 2–316. Ordinarily, pursuant to Uniform Commercial Code § 2–316(2), in order "to exclude or modify the implied warranty of merchantability ... the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous." However, waivers of the implied warranty of merchantability are enforceable under Section 2-316 (3) (a) of the Uniform Commercial Code where "expressions like 'as is,' 'with faults' or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty." While the waiver of express and implied warrantees in the parties' adoption agreement may pass muster under Uniform Commercial Code § 2-316 (3)(a), that waiver may also have been the result of North Shore Animal League's alleged concealed fraud. For that reason, the warranty of merchantability survives. North Shore Animal League's position that there are no cases holding that vicious propensities constitute

unmerchantability is rejected. Juxtapose, there are no cases holding that a dog's merchantability is not negated by vicious propensities.

The plaintiff's alleged failure to notify North Shore Animal League of the few problems she experienced with Lucky or failure to return him or seek guidance, does not require dismissal of her claim. *Gebbia v Schulder,* 32 Misc3d, relied on by North Shore Animal League, is distinguishable. In that case, the plaintiff failed to advise the defendant that the dog was sick, that its illness progressed and that it died. Here, the plaintiff's limited experiences were completely consistent with what North Shore Animal League had cautioned her of. Therefore, failure to notify North Shore Animal League of those occurrences does not require dismissal of the complaint.

Finally, the plaintiff's claim for intentional emotional distress must fail as the claimed conduct is not sufficiently outrageous. (*Howell v. New York Post Company*, 81 NY2d 115). "The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress (citations omitted)." (*Klein v. Metropolitan Child Servs., Inc.*, 100 AD3d 708; *Howell v. New York Post Co.*, 81 NY2d 115). "The subject conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Klein v. Metropolitan Child Servs., Inc.*, *supra* at 710, quoting *Murphy v. American Home Prods. Corp.*, 58 NY2d 293, quoting Restatement [Second] of Torts § 46, comment d). The allegations here do not rise to the level required to advance such a claim. (*Fairman v. Santos*, 174 Misc2d 85).

In conclusion, the defendant North Shore Animal League's motion for summary judgment is denied, however, that branch of the defendant's motion seeking dismissal of plaintiff's claim for intentional infliction of emotional distress is granted.

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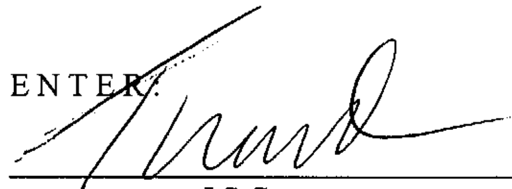

J.S.C.

Dated: October 8, 2014

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