Castellano v Key
2014 NY Slip Op 32280(U)
August 25, 2014
Supreme Court, New York County
Docket Number: 151199/2012
Judge: Peter H. Moulton

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 57

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MELISSA CASTELLANO

Plaintiff,

Index No. 151199/2012

- against -

EMILY KEY and KEVIN KEY

Defendants.

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PETER H. MOULTON, J.S.C.:

In this action plaintiff Melissa Castellano seeks partial summary judgment against defendants Emily and Kevin Key pursuant to CPLR § 3212(e), asserting that defendants, as a matter of law, failed to exercise proper care of plaintiff's dog Samson while the dog was in their care. Plaintiff's motion for partial summary judgment is based upon her first cause of action for bailment, and consequential property damage caused by defendants' negligence, under the doctrine of res ipsa loquitur. She also moves for summary judgment on her third cause of action as a third-party beneficiary of veterinary services administered to her injured dog. Plaintiff further moves, pursuant to CPLR §§ 3211(b) and 3013, for dismissal of defendants' affirmative defenses. Defendants oppose plaintiff's motion, submitting that multiple material issues of fact relative to defendants' liability for plaintiff's dog's injuries make a motion for summary judgment premature at this juncture in the case.

[* 2]

BACKGROUND

Plaintiff alleges that she hired defendant Emily Key to care for her dog, Samson, from August 14, 2011 through and including August 19, 2011 for an agreed upon price of $60.00 per day (*see* Aff. of Mary Castellano ¶ 7). On August 14, 2011, Emily Key took Samson into her care (*Id.* at ¶ 7). On or about August 16, 2011, Emily Key delivered Samson to the American Medical Center, a veterinary hospital. (*Id.* at ¶ 11). At the time the dog was injured, suffering from several broken vertebrae. (*Id.*). Additionally, the dog was unable to use his rear legs and other bodily functions. (*Id.*). Plaintiff states that defendants failed to exercise due care and return Samson to plaintiff in the same condition as he was when they took him into their care and custody. Plaintiff further states that Emily Key promised to pay the hospital bills and medical charges associated with the care of the dog by signing a hospital form authorizing surgery. (*Id.* at ¶ 13). According to plaintiff, defendants subsequently refused to fulfill that promise (*Id.*). In support of that contention, plaintiff relies on statements made to veterinarian Dr. Joshua Gehrke in his affidavit. Dr. Gehrke had performed an MRI and CT Scan of Samson (*Id.*). Such procedures, Dr. Gehrke explains, would not have been performed without someone providing an assurance to pay the estimated cost of the veterinary services (*see* Aff. of Dr. Joshua Gehrke ¶ 10). Plaintiff contends that Emily Key provided her with such an assurance.

Defendants refute those claims. In her affidavit Emily Key states that at the time that she agreed to take care of Samson, the dog was in poor health and had pre-existing health issues (*see* Aff. of Emily Key ¶ 3). According to Emily Key, defendants had cared for Samson on approximately six prior occasions, feeding him, walking him, and giving him medication when necessary. (*Id.* at ¶ 4).

At the time of the incident, Key asserts that she lived with her husband, defendant Kevin Key, and their three children in a two-story home. (*Id.* at ¶ 4). On the morning of August 16, 2011, Emily Key states that she took her three children to camp and later to a play date with their friends. (*Id.* at ¶ 4). Samson was left alone while she and her children were out of the house. (*Id.*). Her husband, Kevin Key, a superintendent in the building in which defendants live, was working outside the home during the relevant period of time. (*Id.* at ¶ 9). When Emily Key returned to her home she states that she saw Samson on the bottom floor of the apartment, sitting on his tailbone. (*Id.* at ¶ 10). Upon closer inspection, she states that it was evident that the dog was injured (*Id.*). As such, Emily Key took Samson to the Animal Medical Center. (*Id.* at ¶ 13). She also states that once it was apparent that Samson was injured, she attempted to contact plaintiff to no avail. (*Id.* at ¶ 12). Emily Key states that she was finally able to get a hold of plaintiff while at the Animal Medical Center. (*Id.* at ¶ 15). There, she claims that plaintiff spoke to the veterinarian treating her dog, and that plaintiff authorized the veterinarian to perform surgery on Samson (*Id.* at ¶ 14). Emily Key denies making any assurances to pay Samson's estimated veterinary fees before surgical procedures commenced. She states that plaintiff agreed to pay such fees, and further states that she only signed a form authorizing the treatment of the dog at plaintiff's behest. Defendants further deny that they were negligent, and state that they never agreed to pay the expenses associated with the care and treatment of Samson.

DISCUSSION

A party wishing to prevail on a motion for summary judgment must make a prima facie showing of entitlement to a judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issues of fact (*see Zuckerman v. City of New York*, 49 NY2d

557 [1980]). When faced with a motion for summary judgment, a court must view the evidence presented in a light most favorable to the opposing party (*see J.E. Beth Israel Hosp.*, 295 AD2d 281, 283 [2002], *lv denied*, 99 NY2d 207 [2003]). To that end, a court's function on a summary judgment motion is "issue-finding rather than issue determination," and where a material issue appears relative to liability, the court must deny the motion (*see Dallas-Stephenson v. Waisman*, 39 AD3d 303, 306 [1st Dept. 2007]).

Here, summary judgment is not warranted on plaintiff's first cause of action for bailment and consequential property loss, because questions of fact exist as to whether defendants' were negligent. Under New York law, a bailment involves "the delivery of personal property for a particular purpose under an express or implied contract with the understanding that it shall be redelivered to the person delivering it, or kept until he reclaims it after fulfillment of the purposes for which it was delivered" (*see* 9 N.Y.Jur.2d, *Bailments & Chattel Leases* § 1). A bailment "may arise from the bare fact of the thing coming into the actual possession and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner" (*Phelps v. People*, 72 NY 334, 358 [1878]). Moreover, a "[b]ailment does not necessarily and always, though generally, depend upon a contractual relation. It is the element of lawful possession, however created, and duty to account for the thing as the property of another that creates the bailment, regardless of whether such possession is based on contract in the ordinary sense or not" (*Foulke v. New York Consol. R.R. Co.*, 228 NY 269, 275 [1920]).

In the instant matter, defendants took physical possession of Samson so that defendants could take care of the dog while plaintiff was out of the country. Though no contract was drafted, defendants took lawful possession of the dog under an understanding that the dog would be cared

for while plaintiff was away. By agreeing to care for the dog for the duration of plaintiff's absence, a duty was created for the services contemplated by plaintiff – namely the care of her dog. As such, a bailment for hire was established between defendants and plaintiff that was supposed to last from August 14, 2011, when defendants took possession of the dog, through August 19, 2011, when plaintiff was scheduled to return.

Given the existence of a bailment here, plaintiff contends that defendants' return of the bailed item, *i.e.* Samson, in an injured condition establishes a prima facie case of negligence that entitles plaintiff to summary judgment. Under New York law, the loss or destruction of a bailed item gives rise to a presumption of negligence (*see Hutton v. Public Stor. Mgt.*, 177 Misc2d 540, 541 [2d Dept. 1998]). The presumption of negligence places on the bailee the burden of coming forward with an explanation for the loss or damage of property (*see Procter and Gamble Distrib. Co. v. Lawrence Am. Field Warehousing Corp.*, 16 NY2d 344 [1965]). The court's assessment of a proffered explanation to rebut a bailee's negligence depends, in part, on whether the bailment is for mutual benefit or gratuitous in nature (*see Central School Dist. No. 3 of Towns of Amherst, Cheektowaga & Clarenc v. Insurance Co. of N. Am.*, 55 AD2d 1021 [4th Dept. 1977], *aff'd*, 43 NY2d 878 [1978]). Where, as in here, the defendants expected to be compensated for caring for the bailed item, defendants' common law obligation was to exercise that degree of care which a reasonably careful person would exercise under like circumstances (*see Jays Creation v. Hertz Corp.*, 42 AD2d 534 [1st Dept. 1973]). The considerations that go into whether such reasonable care was exercised include, but are not limited to, the nature and value of the property, the means of protection possessed by the bailee, the relationship of the parties, and other surrounding circumstances (*see Grace v. Sterling, Grace & Co.*, 30 AD2d 61 [1st Dept. 1968]).

Here, defendants have proffered a legally sufficient basis to rebut the presumption of negligence. Defendants state that they walked Samson, fed him, and gave him his medicine while he was under their care. Defendants go on to state that they had a prior relationship with plaintiff, and had taken care of Samson on previous occasions. On the morning of the incident, defendants state that Emily Key took her children to a church camp between the hours of 10:00 AM and 1:00 PM and later to a play date with their friends. At the time, defendant Kevin Key was at work, leaving Samson alone at defendants' home. Defendants returned home after 4:00 PM and found Samson sitting on his tailbone, injured. According to defendants' account, neither Mr. Key nor Mrs. Key nor their three children were present when Samson was injured.

Defendants' conduct in leaving Samson at home unattended does not demonstrate negligence as a matter of law. Instead, defendants aforementioned conduct raises questions of fact with respect to whether their actions fell within those of a reasonably prudent person or persons under the same or similar circumstances. A finder-of-fact may determine that a reasonably prudent person would not have been expected to keep plaintiff's dog in his or her direct supervision at all times. In analogous contexts, New York courts have routinely found that babysitters, schools, and camps are not required to provide uninterrupted supervision to children (*see Mirand v. City of New York*, 84 NY2d 44, 49 [1994]; *see also Phelps v. Boy Scouts of Am.*, 305 AD2d 335 [1st Dept. 2003]). Here a finder-of-fact could conclude that the level of care exercised by defendants met the threshold of ordinary care under the law. As such, defendants have demonstrated an issue of triable fact.

Plaintiff's assertion that the doctrine of res ipsa loquitur requires a different result is unpersuasive. The doctrine of res ipsa loquitur may be invoked only where the unexplained circumstances of a case justify the inference of negligence (*see Abbott v. New Rochelle Hosp. Med.*

Ctr., 141 AD2d 589, 590-91 [2d Dept. 1988]; *see also Breese v. Hertz Corp.*, 25 AD2d 621 [1st Dept. 1966]). Where evidence is capable of an interpretation consistent with either the presence or absence of a wrongful act, courts have held that the interpretation to be ascribed is that which accords with its absence (*see Schock v. Dougherty,* 122 AD2d 467, 469 [3d Dept. 1986]; *see also Braun v. Consolidated Edison Co.* of N.Y., 31 AD2d 165, 169 [1st Dept. 1968]).

Here, Samson could have been injured with or without defendants' exercise of reasonable care. It is unclear whether defendants' mere act of leaving the dog alone in their home was in and of itself a wrongful act. A fact-finder may or may not ultimately find negligence under the factual narrative presented. The weight, therefore, falls in favor of suggesting the absence of a wrongful act. The doctrine of res ipsa loquitur does not apply.[1]

Plaintiff next contends that she is entitled to summary judgment on her third cause of action as a third-party beneficiary of the hospital contract signed by defendant Emily Key. A party claiming to be a third-party beneficiary has the burden of demonstrating an enforceable right to a benefit (*see Strauss v. Belle Realty Co.*, 98 AD2d 424, 427 [2d Dept. 1983]). Moreover, a third-party beneficiary must establish: 1) the existence of a valid and binding contact between other parties, 2) that the contract was intended for the third-party's benefit, and 3) that the benefit to the third-party is immediate, and therefore indicates a duty by the contracting parties to compensate the third-party

[1]Though not a bailment case, the Court of Appeals ruling in *Morejon v. Rais Const. Co.*, 7 NY3d 203 (2006), which applied the doctrine of res ipsa loquitur, does not require a different result. There, as plaintiff points out, the Court of Appeals eschewed the word "presumption" in favor of the word "inference." The Court of Appeals went on to state that the res ipsa doctrine should not be invoked as a basis for granting a motion for summary judgment unless "the plaintiff's circumstantial proof is so convincing and...defendant's response so weak that the inference of defendant's negligence is inescapable" (*id.* at 209). That is not the case here, where negligence cannot be presumed let alone inferred on a motion for summary judgment based on the evidence proffered by plaintiff.

(*see Castorino v. Unifast Bldg. Prods. Corp.*, 161 AD2d 421, 422 [1st Dept. 1990] *citing Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 NY2d 314, 336 [1983]); *see also Edge Mgt. Consulting, Inc. v. Blank*, 25 AD3d 364 [1st Dept. 2006]). When determining whether or not to afford third-party beneficiary status, a court may look at the surrounding circumstances of a case (*see Aievoli v. Farley*, 223 AD2d 613 [2d Dept. 1996]).

Material issues of fact preclude a finding that plaintiff was a third-party beneficiary of the hospital surgery agreement signed by Emily Key. According to defendant Emily Key's affidavit, on the date that she found Samson injured in her home, she immediately called and sent a text message to plaintiff. Emily Key goes on to state that when she could not get a hold of plaintiff, she attempted to contact plaintiff's parents, who did not respond. After her attempts to reach plaintiff proved to be unsuccessful, Emily Key took Samson to an animal hospital that had previously prescribed the dog medication. Once there, Emily Key states that she continued to call plaintiff, especially after she was informed that Samson would require surgery. Prior to surgery, Emily Key states that she was finally able to reach plaintiff and that plaintiff authorized an MRI as well as surgery for the dog. Emily Key states that she only signed papers authorizing the treatment of the dog after plaintiff spoke to the treating physician, and solely in her capacity as plaintiff's agent.

Plaintiff disputes those claims, arguing that she spoke to both Emily Key as well as the veterinarians attending to Samson at various times on the date of the incident. After a series of phone calls, plaintiff states that Emily Key agreed to be responsible for the treatment of plaintiff's dog. Plaintiff goes on to state the she only made arrangements for the continuous treatment of her dog because the hospital indicated that Emily Key had failed to provide her own payment information upon the dog's admittance. Plaintiff claims that the affidavit of Samson's treating

physician, Dr. Gehrke, corroborates plaintiff's account because the affidavit shows that an MRI had already been taken by the time that plaintiff spoke to him. Notwithstanding that fact, Dr. Gehrke's affidavit cannot address any conversations that may have transpired between plaintiff and Emily Key prior to the point at which the MRI was preformed. Questions surrounding the sequence of events that may have unfolded prior to Dr. Gehrke's conversation with plaintiff are amplified by Emily Key's claim that plaintiff sent a text message to her following Samson's hospital visit stating that plaintiff owed defendants money.

As such, the surrounding circumstances here reveal conflicting accounts as to whether an agreement to pay plaintiff's medical bills existed, and whether defendants signed the hospital surgery agreement either as a promise to pay or solely in their capacity as agents. Consequently, the issues of fact raised and the differing accounts proffered preclude summary judgment on plaintiff's third cause of action.

Finally, plaintiff seeks to dismiss defendants' affirmative defenses by stating that the defenses are "conclusory and without facts and clarity." The court disagrees. At this early stage in the instant action, discovery has yet to be exchanged. As such, defendants may not have facts beyond those already articulated to add to their pleadings. Notwithstanding that fact, courts have consistently held that under New York's liberal construction of pleadings, a proponent is afforded every favorable inference when a court determines the sufficiency of a cause of action or an affirmative defense (*see Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746 [2d Dept. 2010]). Defendants have met that burden. Accordingly, dismissal of defendants' affirmative defenses is unwarranted here.

As such, upon the foregoing papers, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied in its entirety.

This Constitutes the Decision and Order of the Court.

Dated: August 25, 2014

ENTER:

J.S.C.

HON. PETER H. MOULTON