| **Nero v Fiore** |
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| 2016 NY Slip Op 30332(U) |
| February 25, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 19686/2015 |
| Judge: Ralph T. Gazzillo |
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Index No: 19686/2015

SHORT FORM ORDER



Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Mot. Seq.: 001 MD
002 MG

Hon. RALPH T. GAZZILLO
A.J.S.C.

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| Mike Tai Nero, | : | Lawrence V. Carra, Esq. |
| | : | 114 Old Country Road |
| Plaintiff(s), | : | Mineola, N.Y. 11501 |
| | : | |
| - against - | : | Joel Salinger, Esq. |
| | : | 354 Veterans Memorial Hwy., Ste.2 |
| Laura Fiore, | : | Commack, N.Y. 11725 |
| | : | |
| Defendant(s), | : | |

Upon the following papers numbered 1- 74, read on this Order to Show Cause; Order to Show Cause and supporting papers numbered 1-14; Affirmation in opposition and supporting papers numbered 15-30; Reply Affirmation and supporting papers numbered 31-46; Affirmation in opposition and supporting papers numbered 47-66; Reply affirmation and supporting papers numbered 67-74; it is,

***ORDERED*** that the plaintiff's Order to Show Cause seeking immediate replevin of a dog is denied in its entirety; and it is further

***ORDERED*** that the defendant's cross motion is granted as to both the first and second causes of action and accordingly those causes of action (and therefore the action itself) are dismissed, and it is further

***ORDERED*** that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)( 1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

By Order to Show Cause, this action in replevin[1] was commenced by the plaintiff seeking the immediate return of a Doberman Pincher dog from the defendant and for damages for the defendant's alleged tortious interference with a contract made between the plaintiff and the dog's sellers. The temporary relief sought in the original Order to Show Cause; i.e. the immediate delivery of the dog from the defendant to the plaintiff was denied by Order of this Court dated November 13, 2015 (Rouse, J.).

In his application plaintiff alleges that he and the defendant purchased the dog in June of 2013. By way of background, the plaintiff is apparently very involved in training protection and working dogs and is also very involved in competitions relating to "Protection-Sport" dogs. The plaintiff has several accreditations for his work in this area and is apparently well known in the field and is the head trainer/owner of All Stars Working Dogs, a club that is within the Protection Sport Association (hereinafter PSA), an association of people and clubs involved in protection-sport dogs. According to the plaintiff, PSA has established levels for judging the acumen and obedience of dogs and provides accreditation for dogs that reach certain levels, level 3 being the highest. Plaintiff asserts that working dogs having a PSA level 3 accreditation are sold for between $20,000.00 and $80,000.00. Based upon his purported stellar reputation in this field, plaintiff asserts that he is able to acquire superior bred puppies for training with the hope that the dogs will reach a PSA level 3 "titling" which would qualify a dog to be sold as a working dog to law enforcement or to the military.

According to the plaintiff he met the defendant (a veterinarian) at an informal PSA event in 2011. Thereafter, he alleges that they became romantically involved and that they began "cohabitating" despite maintaining their separate residences. Plaintiff's complaint alleges that thereafter "[o]n or about May, 2013, the plaintiff and defendant decided to acquire a Doberman puppy which the Plaintiff would train and title." Thereafter, in June 2013, using his good will and excellent reputation as a PSA trainer, he arranged for the purchase of the Doberman Pincher puppy through Daryl H. Young, one of the owners of America's Best Dog Trainers which is located in California and is widely known for breeding quality dogs that are appropriate for PSA training and competition. Plaintiff alleges that the defendant paid for the puppy using her personal check but that he intended to pay her back. Plaintiff also alleges that he paid for the puppy's transportation from California to New York. Shortly after receiving delivery of the dog on June 21, 2013 and determining that its demeanor was appropriate for protection sport training, on July 16, 2013 plaintiff claims that he entered into a Purchase Contract for the puppy. A copy of the contract that the plaintiff allegedly entered into states, in pertinent part, that "[b]uyer agrees that he/she is not acting as an agent in the purchase of this Doberman and that the Buyer will not sell this Doberman or it's (sic) progeny to any agent .... **(Should the aforementioned happen to take place. DARYL YOUNG shall receive $10,000.00 in damages).**" (emphasis supplied in original). Thereafter, sometime in late 2015, the parties ended their romantic relationship and plaintiff sought return of the puppy to his possession which he asserts that the defendant refused. According to the Plaintiff, based upon the defendant's refusal to return the puppy to him, he is in violation of his contract with the sellers of the puppy. He further alleges that he is being sued by those breeders in California small claims court based upon his violation of the contract. In support of his assertion that he was expected to be the dog's purchaser (and owner) he submits a letter from the dog's breeders indicating that they sold the puppy to the plaintiff for PSA training and that they reduced the purchase price such with the understanding that if the puppy became titled through plaintiff's training, their other puppies would command a higher price.

Defendant cross moves to dismiss the action pursuant to CPLR 3211(a)(1) and (7).

Initially, even though she strenuously asserts that the puppy was always intended to be hers alone, she points out that the plaintiff's admits in his complaint that the dog was never intended to be solely owned by him. Rather, she claims that plaintiff was assisting her in her quest to acquire another dog so that she could expand her participation in protection sport training. In further support of her application, the defendant acknowledges that she was romantically involved with the plaintiff but asserts that at no time did the two cohabitate to the degree of sharing bills or house keys. She agrees that plaintiff was going to train the puppy but states that it was always intended that she would be the sole owner of the dog and that the dog has always resided with her. Further, she provides evidentiary proof that she paid not only paid the purchase price of the puppy ($1,500.00 rather than the $1,200.00 plaintiff claims was the purchase price), but that she reimbursed the defendant for the cost of transportation by check (which was negotiated by the plaintiff despite his assertions to the contrary). In addition, defendant provides proof that she paid for all veterinary care for the puppy; that the microchip she had implanted in the dog is also registered to her; that she had the puppy registered to her with the American Kennel Club (AKC) and licensed to her in the Town of Islip where she resides. Moreover, defendant provides proof that the plaintiff was aware that she was doing these things and consented to them. She maintains that she was completely unaware that the plaintiff had signed any contract with the breeder/seller of the puppy. In fact, she asserts that it was only after she and the plaintiff had ended their relationship that she learned about the alleged written agreement between the breeder/seller and the plaintiff. In support of this assertion, the plaintiff provides copies of email conversations she had with Daryl Young in or around late September 2015. Defendant also provides copies of PSA competition registration papers which show *defendant* registered as the owner with the plaintiff acting as the dog's handler at a dog competition which registration papers were allegedly completed by the plaintiff. The defendant also provides copies of email, text messaging and photos of on line posts which tend to show that the plaintiff acknowledged to others that she was the owner of the dog. Finally, defendant's reply papers contain proof that the California small claims action commenced against the plaintiff by the dog's breeders has been dismissed.

In reply to the cross-motion to dismiss, the plaintiff acknowledges that the defendant paid for the puppy with her personal check, but claims that this was done as a convenience because he was at her house when he learned that one of the breeders was nearby and that he could drop off a check. Rather than go back to his house first, he used defendant's check. He also states that he attempted to reimburse her for the cost, but that she refused (although there is nothing submitted to substantiate this claim). In addition, he attempts to clarify his use of the word "acquire" when he referred to the allegation in his complaint in which it alleged that he and the defendant decided to "acquire" a puppy. Plaintiff now asserts that when he used the word "acquire" he only referred to the defendant because they were cohabitating and that he needed to be sure that the new puppy would not disrupt the defendant's existing dog or the defendant, and that the use of the word is not indicative of joint ownership. In addition, plaintiff claims that he never negotiated the check given to him by the defendant as reimbursement for the cost of the transportation of the puppy[2] . He further claims that the defendant agreed to aid him in registering the puppy with the AKC but that she was supposed to list him as the owner rather than her. He also asserts that the AKC

documents are not determinative of ownership and that the defendant's payment of the puppy's veterinary and other expenses would have been normal since they were cohabitating.

Dogs are considered chattel in New York State (see ***Mullaly v. People***, 86 N.Y. 365; ***Schrage v. Hatzlacha Cab Corp.***, 13 A.D.3d 150, [1st Dept. 2004]; ***Rowan v. Sussdorff***, 147 AD 673). As such, the most that can be recovered in the event the dog is lost as a result of someone's negligence is the dog's fair market value (see, ***Jason v. Parks***, 224 A.D.2d 494, 638 N.Y.S.2d 170 [2d Dept. 1996] ). In addition, the remedy to recover a dog when someone refuses to return it is an action for replevin (see, ***Travis v Murray,*** 42 Misc.3d 4447; Webb ***v. Papaspiridakos***, 23 Misc.3d 1136(A). The standard required to be awarded possession of a chattel in an action for replevin is having a "superior possessory right in the chattel" (see, ***Travis v. Murray, supra; Pivar v. Graduate Sch. of Figurative Art of the N.Y. Academy of Art***, 290 A.D.2d 212). Accordingly, the ability to care for, or in this case, train a dog, is not ultimately determinative of ownership. (see, ***Travis v. Murray, supra).*** In addition, in an action for replevin for a pet, the court can consider what is "best for all concerned" (see, ***Webb v. Papaspiridakos***, 23 Misc.3d 1136(A); ***Raymond v. Lachmann***, 264 A.D.2d 340).

The plaintiff's application seeking immediate return of the chattel must be denied as a matter of law[1]. A review of the papers submitted fail to establish that he has a superior possessory right to the chattel (see, ***Merriam v. Johnson***, 116 App Div 336). Clearly, based upon the allegations in the complaint alone, which are internally inconsistent, the plaintiff is not entitled to the return of the chattel. Specifically, in one paragraph he alleges that he *and* the defendant "decided to acquire a Doberman puppy" and then several paragraphs later alleges that he is the "sole owner" of the dog. Moreover, plaintiff has failed to produce a single document that establishes that he is the dog's sole owner and has a superior right to possession of the chattel (*see,* ***Merriam v. Johnson****, supra.*).

Turning to the defendant's motion to dismiss the action pursuant to CPLR 3211(a)(7), the challenged pleading is to be construed liberally (see CPLR §3026; ***Leon v Martinez***, 84 NY2d 83, 87; ***Bernberg v Health Mgt. Sys.***, 303 AD2d 348, 349). Accepting the facts alleged as true, and according the plaintiff the benefit of every possible favorable inference, the court must determine only whether the facts alleged fit within any cognizable legal theory (see ***Leon v Martinez***, 84 NY2d at 87-88). However, "[t]o state a cause of action for replevin, a plaintiff must allege that he or she owns specified property, or is lawfully entitled to possess it, and that the defendant has unlawfully withheld the property from the plaintiff" (See, ***Khoury v. Khoury***, 78 A.D.3d 903, 904).

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[1] It bears noting that the plaintiff's Order to Show Cause and reply to the defendant's opposition fails to refer to any legal authority whatsoever in support of his demand for immediate return of the dog. Not a single case or statute is cited leaving the Court to identify and evaluate plaintiff's claims.

Here, the plaintiff's First Cause of Action in the complaint admits: "the Plaintiff *and* the Defendant decided to acquire a Doberman puppy" and that "[d]efendant wrote a check to either Daryl H. Young, or his partner, Ishmael Calvin Ross ... for payment upon the Doberman puppy." (emphasis added). This allegation alone warrants the dismissal of the first cause of action in the complaint since it is completely inconsistent with plaintiff's claim that he is the owner of the puppy such that he would be entitled to possession, much less "immediate possession" as he claims. Plaintiff has failed to produce any document which would establish that he is the owner of the puppy and therefore having a superior right to possession such that the defendant's continued possession constitutes conversion. Conversely, the defendant has provided proof that she has paid for, registered, licensed and cared for the puppy since it was acquired. The fact that the plaintiff has trained the dog is not determinative of ownership (see, ***Pivar,*** *supra).* Accordingly, since the plaintiff has failed to persuasively state a cause of action for conversion or replevin, his first cause of action must be dismissed.

The Plaintiff's second cause of action must likewise be dismissed. In his complaint the plaintiff asserts that the defendant has "tortuously interfered with contractual relations of the plaintiff and his customers, and has wrongfully attempted to frustrate additional or new business inuring to plaintiff's economic benefit". However, other than that conclusory allegations, the complaint fails to specifically allege the specific acts of the defendant that caused him the alleged damages. Conclusory allegations are insufficient to state a cause of action for tortious interference with prospective business relations (see, ***Cohen v. Gluck,*** 131 Ad3d 1117; ***M.J. & K Co. v. Matthew Bender & Co.***, 220 AD2d 488). The plaintiff's second cause of action also appears to allege that defendant has committed "fraud". It is axiomatic that claims for fraud must be specifically plead (see, CPLR 3016(b)). "A fraud claim must be pleaded with particularity pursuant to CPLR 3016(b). The purpose of the statute is to give adequate notice and "is not to be interpreted so strictly as to prevent an otherwise valid cause of action" (***Sterling National Bank, Plaintiff v. J.H. Cohn LLP***, 40 Misc.3d 1230(A), 2, quoting ***Houbigant, Inc. v Deloitte & Touche LLP***, 303 AD2d 92, 97-98 and ***Lanzi v Brooks***, 43 NY2d 778, 780). A reading of the complaint shows that the plaintiff has not alleged a single detail of the alleged fraud that he claims the defendant has committed.

Although it is unnecessary to reach the defendant's motion to dismiss the complaint based upon documentary evidence pursuant to CPLR 3211(a)(1), a review of that evidence appears to establish that defendant is entitled to dismissal of the action on those ground as well since she has submitted sufficient documentary evidence to establish that she is the owner of the dog. The documentary evidence is not disputed. Specifically, it is undisputed that the defendant paid the $1,500.00[2] purchase price for the puppy and cost of its transportation from California to New York. It is further undisputed that the puppy has resided with the defendant and that she registered it with the AKC and licensed it in the Town of Islip. Accordingly, the defendant is

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[2] Although the plaintiff claims that the purchase price of the dog was $1,200.00 (allegedly heavily discounted due to his reputation as a PSA trainer) and the contract that the plaintiff allegedly signed with the defendant shows that the purchase price for the puppy as $1,200.00, the defendant has produced proof that she paid $1,500.00 for the puppy and that she reimbursed the plaintiff $263.39 for the transportation cost of the puppy from California to New York.

entitled to dismissal of the first cause of action in the complaint on those grounds as well. Indeed, and purely as a parenthetical, contrasting the plaintiff's allegations and the documentary evidence reveals disparities whose flagrance is not appealing.

Based upon the reasons set forth herein, the plaintiff's Order to Show Cause is denied and the complaint is dismissed in its entirety.

Dated: 2 25 16
Riverhead, N.Y.

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition