

Puppies Behind Bars, Inc. v Doolen
2019 NY Slip Op 33656(U)
December 13, 2019
Supreme Court, New York County
Docket Number: 656108/2019
Judge: Nancy M. Bannon
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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INDEX NO. 656108/2019

PUPPIES BEHIND BARS, INC.

MOTION DATE 11/20/19

Plaintiff,

MOTION SEQ. NO. 001

- v -

CHARLES DOOLEN,

**DECISION AND ORDER
ON MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

In this action for replevin of a trained service dog named Slater, the plaintiff, Puppies Behind Bars, Inc., alleges that the defendant, Charles Doolen, to whom Slater was assigned, has jeopardized the wellbeing of the dog and refused to return him to the plaintiff in violation of the parties' agreement. The plaintiff is a 501-c charity that trains prison inmates to raise service dogs for wounded veterans and first responders, as well as explosive-detection canines for law enforcement. The plaintiff trained and paired Slater with the defendant, a Massachusetts resident, in June 2019. On August 21, 2019, the plaintiff received a call from the Chesterfield, MA, Police Department, advising that Slater was found wandering alone and was identified by the police by scanning Slaters' implanted micro-chip which contained the plaintiff's address and phone number. The plaintiff thereafter made attempts to have Slater returned but the defendant has not cooperated. This action ensued.

The complaint alleges causes of action for a breach of contract, declaratory judgment and for other injunctive relief. The defendant has not answered or appeared. On October 31, 2019, the court granted a temporary restraining order, prohibiting the defendant from removing, transferring, secreting, or otherwise dispossessing himself of the service dog pending the hearing of this motion for preliminary injunction. The plaintiff moves pursuant to CPLR 6301 (1) to preliminarily enjoin the defendant from removing, selling, transferring, or otherwise secreting

the service dog during the pendency of the action, and (2) for replevin of the dog. No opposition was submitted. The motion is granted in part.

To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor. See CPLR 6301; Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 (2005); Doe v Axelrod, 73 NY2d 748, 750 (1988). The plaintiff has demonstrated, by clear and convincing evidence, its likelihood of success on the merits in this replevin action. Replevin, a remedy at law (see CPLR 7101 et seq.; Boyle v Kelly, 42 NY2d 88 [1977]), can be invoked to recover a unique chattel, including companion animals. See Schrage v Hatzlacha Cab Corp., 13 AD3d 150 (1st Dept. 2004). Although there is a distinction between a service animal and a companion animal (compare NY Penal Law 240.00; NY Agric. & Mkts. Law 350), for the purposes of a replevin action the analysis afforded companion animals is appropriate. To establish a claim for replevin of a companion animal, a plaintiff must show that it is entitled to immediate possession of the animal, or in cases of disputed ownership a superior possessory right to the animal, that a demand for the return of the animal was made, and that return has been refused by the possessor of the animal. Raymond v Lachmann, 264 AD2d 340 (1st Dept 1999).

Here plaintiff has demonstrated its likelihood of success by showing that it is entitled to immediate possession of Slater because according to the agreement between the parties Slater remains the exclusive property of the plaintiff, and the plaintiff may recover Slater if, for any reason, the plaintiff determines that it is not in the best interest of Slater, or the plaintiff, for Slater to remain with the defendant. The plaintiff further establishes its right to recover Slater by submitting the affidavit of Gloria Gilbert Stoga, its President, which sets forth the plaintiff's determination that it is not in the best interests of Slater to remain with the defendant, as Slater was found unaccompanied on a public road, and that the plaintiff has demanded the return of Slater, and the defendant has refused to return him.

The plaintiff also demonstrates there would be irreparable harm caused were the preliminary injunction not granted, as the removal, sale, transfer, or secreting of Slater would impair the plaintiff's ability to recover their specially trained service dog, and potentially endanger the health, safety or life of the dog. The balance of equities is also favors the branch of its motion to enjoin the defendant from removing, selling, transferring, or otherwise secreting

the service dog during the pendency of the action. In evaluating whether to grant a preliminary injunction, the balancing of the equities requires a court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief. Barbes Rest. Inc. v ASRR Suzer 218, LLC, 140 AD3d 430 (1st Dept. 2016). In this instance, there would be little, if any, prejudice to the defendant, as he would be enjoined from removing, selling, transferring, or secreting a service animal that he has no ownership right in, as he had agreed to do, whereas the plaintiff would be prejudiced were the requested relief denied, as the removal, sale, or transfer of the service dog would impair their ability to ultimately recover a specially trained service animal.

Turning to the branch of the plaintiff's motion for preliminary injunction seeking replevin of the service animal, it is well settled that a preliminary injunction which gives plaintiff the ultimate equitable relief sought in the action is generally improper and may only be granted under "extraordinary circumstances" (see Village of Westhampton Beach v Cayea, 38 AD3d 760 [2nd Dept. 2007]) or circumstances which are "imperative, urgent or of grave necessity" so as to warrant such relief (see Xerox Corp. v Neises, 31 AD2d 195 [1st Dept. 1968])." Sithe Energies, Inc. v 335 Madison Avenue, LLC, 45 AD3d 469 (1st Dept. 2007). The circumstances warranting such relief must be "upon clearest evidence, as where the undisputed facts are such that without an injunction order a trial will be futile." Xerox Corp. v Neises, *supra*. Although replevin may ultimately be warranted, the branch of the plaintiff's motion seeking replevin must be denied at this juncture. However, the denial of this branch of the motion seeking replevin is without prejudice to move for default judgment pursuant to CPLR 3215, or seek alternate relief, if appropriate.

The party seeking a preliminary injunction must post an undertaking in an amount that will pay the damages and costs to the person who is enjoined if it is ultimately determined that the preliminary injunction was erroneously issued. See Margolies v Encounter, Inc., 42 NY2d 475 (1977); CPLR 6312(b). Although CPLR 6312(b) provides the court with discretion in setting the undertaking, it also unequivocally mandates that the plaintiff furnish an undertaking "prior to the granting of a preliminary injunction." This requirement cannot be waived by the court. Rourke Developers Inc. v. Cottrell-Hajeck Inc., 285 AD2d 805 (3rd Dept 2001). Here, the granting of a preliminary injunction on the first branch of the plaintiff's motion enjoining the defendant from the removal, sale, transfer, or secreting of the service dog, Slater, would only prevent the defendant from actions that are barred by the agreement between the parties. As

such, there are no apparent damages that the defendant would suffer should this injunction have been issued erroneously. In such instances, courts have posted nominal undertakings designed to protect a party in connection with any costs that it may have assumed in connection with the preliminary injunction (Daytop Vill., Inc. v. Consol. Edison Co. of New York, 61 AD2d 933 [1st Dept. 1978] [\$1000.00]), or to compensate for potential short delays caused by the injunction (see Wuertz v. Cowne, 65 AD2d 528 (1st Dept 1978) [\$100.00]). Therefore, under the circumstances, a nominal undertaking set at \$300.00 is appropriate.

Accordingly, and upon the foregoing papers, it is

ORDERED that the motion by the plaintiff, Puppies Behind Bars, Inc., for preliminary injunction is granted, pursuant to CPLR § 6301, to the extent of enjoining the defendant from the removal, sale, transfer, or secreting of the service dog, Slater, provided that an undertaking in the fixed sum of \$300.00, in the form of a surety bond or a deposit of cash, money order, or bank check, be deposited with the County Clerk of the County of New York, and remain in effect until further order of this court, and the remainder of the motion is denied without prejudice; and it is further,

ORDERED that the defendant, his agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of the defendant, are enjoined and restrained, during the pendency of this action, from doing or suffering to be done, directly or through any attorney, agent, servant, employee or other person under the supervision or control of the defendant or otherwise, the removal, sale, transfer, or secreting of the service dog, Slater, and it us further

ORDERED that the parties shall appear for a status conference on January 30, 2020 at 10:00 a.m.

This constitutes the Decision and Order of the Court.

12/13/2019

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

NANCY M. BANNON J.S.C.
HON. NANCY M. BANNON