SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JAMES CULVER, POINT OF ORDER, LLC and DREAM TEAM RACING STABLE, LLC,

Plaintiff,

-against-

"JOHN DOE," a fictitious person, intending to be the person who transported Plaintiff's thoroughbred filly "Point of Order," and NEW YORK RACING ASSOCIATION,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.: 19277/07
Motion Seq. No.: 03 & 04

DECISION AND ORDER

Papers Read on this Motion:

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Relief Requested:

In motion sequence number three (3), the Plaintiffs move pursuant to CPLR §3025(b)(c) for an order supplementing and amending the summons and complaint and for an order pursuant to CPLR §3211(b) striking the Defendants' affirmative defenses.

In motion sequence number four (4), the Defendants move pursuant to CPLR §§3212, 3211(a)(7) and (10) for an order dismissing the within complaint.

Deposition Testimony of the Parties

Plaintiffs James Culver and Point of Order, LLC were the owner of a thoroughbred filly known as "POINT OF ORDER" (*see* Verified Compliant at ¶¶3, 5). Plaintiff, Dream Team Racing Stable, LLC is a horse management company and is owned by Mr. Culver (*id.* at ¶4; *see also* Deposition Testimony

of James Culver at p. 110). Mr. Culver states that he hired a Ms. Christina Dupps to train the filly, who in turn hired a groom by the name of Mr. Clarence Fields (*see* Deposition Testimony of James Culver at pp. 165,177,178).

On or about March 25, 2007, the thoroughbred raced at Aqueduct raceway which is owned by Defendant, New York Racing Association [hereinafter NYRA] (*id.* at ¶¶9, 14). Subsequent to the race, the in-house veterinarians located at the raceway allegedly recommended that the thoroughbred be stalled on the premises to rest for thirty days and recuperate from a "minor, non-debilitating pelvic injury" which was thought to be a fractured pelvis (*id.* at ¶14; *see* deposition transcript of James Culver at pp. 196, 209). Contrary to the initial recommendations, on the sixth day following the injury, it is alleged that at the behest of a veterinarian at the track, the filly was transported to Belmont Park, which is also owned by the NYRA (*see* Verified Complaint at ¶¶ 9, 15; *see also* deposition transcript of James Culver at pp. 211,214). On March 31, 2007, the filly was transported in a vehicle operated by John Doe, who was an employee of NYRA (*see* Verified Complaint at ¶¶16, 17, 18). John Doe has since been identified as Mr. Michael Czech. During the course of transport, it is alleged that the driver abruptly started the vehicle in a violent and reckless manner causing the horse to fall and sustain a fractured leg which ultimately caused its demise (*id.* at ¶¶19, 25). Mr. Culver states that he was away in Florida when the events relevant to the within action occurred, he was appraised of same via communications with the filly's trainer, Ms. Dupps (*see* Deposition Transcript of James Culver at pp. 200,202, 208).

Mr. Czech testified that on the day of the incident, he was instructed by his foreman to transport the filly from Aqueduct to Belmont (*see* Deposition Testimony of Michael Czech at p.14). The transport would be accomplished by a horse ambulance which consisted of an "open trailer with a wall that moves" and "slides from side to side" and is attached to a "tractor trailer cab" (id. at pp. 23, 26). He

stated that prior to the filly being loaded into the horse ambulance, he personally conducted an inspection of the vehicle to determine that it was in working order (*id.* at p.19). Said inspection included checking the oil, transmission, the moving parts inside the vehicle, the hydraulics and the doors to insure that they opened, closed and locked properly (*id.*). Mr. Czech stated no problems were detected (*id.*). He stated that he subsequently proceeded to drive the ambulance to the receiving barn whereupon the filly was loaded onto the ambulance by a groom (*id.* at p.22). Mr. Czech was unable to identity the groom by name (*id.*). Mr. Czech stated that as he witnessed the horse walking into the ambulance, he noticed that the horse appeared to be "sore" and "in distress" (*id.*; *see also* p. 46). After the filly, accompanied by the groom, was inside the trailer, he closed the door and proceeded to Belmont (*id.* at pp. 31, 32). Mr. Czech stated that while driving to Belmont, he stopped his vehicle because he noticed in the mirror that the side door was open (*id.* at p.36). He exited the vehicle and then closed the door whereupon the groom pushed it back open and told him that "the horse had fell down" because he "was driving like a race car driver" (*id.* at p. 40). Mr. Czech testified that he observed the horse at that point in time and she was "down on her knees" (*id.*). Mr. Czech thereafter resumed the trip and delivered the filly to Belmont where she was euthanized (*id.* at p. 49).

The Underlying Cause of Action

As a result of the foregoing, the underlying action was thereafter commenced by the Plaintiffs alleging causes of action sounding in negligence and breach of contract (*see* Flanzig Affirmation at Exh. A). In response thereto, the Defendants interposed an answer which included nine affirmative defenses (*id.*). The Plaintiff now moves seeking dismissal of the Defendants' Fourth Affirmative Defense (Plaintiffs were culpable for the happening of the event), Fifth Affirmative Defense (Plaintiffs assumed the risk), Sixth Affirmative Defense (failure to mitigate damages), Seventh Affirmative

Defense (Plaintiffs lack capacity), Eighth Affirmative Defense (Plaintiffs damages were caused or contributed to by the negligence of parties not named herein), Ninth Affirmative Defense (documentary evidence) and Tenth Affirmative Defense (failure to join a necessary party). The Plaintiffs additionally move for leave to amend the within complaint to add Mr. Michael Czech as an additional Defendant.

Plaintiffs' Motion pursuant to CPLR § 3211[b]

In support of that branch of the application seeking dismissal of the Defendants' above-cited affirmative defenses, counsel for the Plaintiff argues that same are completely devoid of merit and should thus be stricken (*see* Flanzig Affirmation at ¶¶13, 14). With respect to that branch of the application seeking leave to add Mr. Czech as an additional Defendant, counsel argues that through the process of discovery it has been revealed that Mr. Czech was operating the vehicle on the day of the accident and was employed by NYRA (*id.* at ¶9). Counsel further argues that as no surprise or prejudice will be visited upon the Defendants, said application should be granted (*id.* at ¶¶11, 12). The application is opposed by the Defendants who also cross move seeking dismissal of the within complaint on several grounds.

"A party may move for judgment dismissing on or more defenses, on the ground that a defense is not stated or has no merit" (CPLR §3212[b]). "Upon a motion to dismiss a defense, the Defendant is entitled to every reasonable intendment of its pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed" (*Butler v Citrinella*, 58 AD3d 145 [2d Dept 2008]quoting *Federico v Metropolis Night Club, Inc.* 48 AD3d 741 [2d Dept 2008]; *see also Amerind Hess Corp. v Town of South old*, 39 AD3d 442 [2d Dept 2007]). However, affirmative defenses plead as conclusions of law that are unsupported by the facts in the record are insufficient and should be dismissed (CPLR §3013; *Cohen Fashion Optical Inc. v V&M Optical Inc.*, 51 AD3d 619 [2d

Dept 2008]; *see also Bechar v Feeler*, 64 AD3d 672 [2d Dept 2009]). When making such an application, the Plaintiff bears the burden of demonstrating that the defenses are devoid of merit as a matter of law (*Vita v New York Waste Services, LLC.*, 34 AD3d 559 [2d Dept 2006]).

Applying the foregoing principles, the Court hereby **GRANTS** that portion of the Plaintiffs' application seeking dismissal of the Fourth Affirmative Defense alleging that the Plaintiff was culpable for the happening of the event. Here, there is no evidence in the record to suggest that the Plaintiffs in any way contributed to the happening of the subject accident which forms the basis of the within action and accordingly the defense is ***dismissed*** (*Cohen Fashion Optical Inc. v V&M Optical Inc.*, 51 AD3d 619 [2d Dept 2008], *supra*).

With respect to those Affirmative Defenses denoted Sixth, Seventh and Ninth and which respectively allege that the Plaintiffs failed to mitigate their damages, the Plaintiffs lacked capacity to sue and that the Defendants liability is "limited or eliminated based upon documentary evidence," the Court **GRANTS** the Plaintiffs' application and **dismisses** said defenses. While indeed a Plaintiff must make a reasonable effort to mitigate his or her damages, there is no factual support to demonstrate that the Plaintiffs' have failed to do so (*see Jewish Press Inc. v Wiener*, 190 AD2d 841 [2d Dept 1993]; *Becher v Feller*, 64 AD3d 672 [2d Dept 2009], *supra*). Similarly, there is no factual support that the named Plaintiffs lack the capacity to maintain the within action, and the record herein is devoid of any documents where the substance of which either limits or eliminates the Defendants' liability for the happening of the subject incident (CPLR § 3013; *Cohen Fashion Optical Inc. v V&M Optical Inc.*, 51 AD3d 619 [2d Dept 2008], *supra*; *see also Bechar v Feeler*, 64 AD3d 672 [2d Dept 2009], *supra*).

The Court now turns to that branch of the Plaintiffs' application which seeks leave to add Mr. Michael Czech (formerly sued as John Doe) as a party Defendant. It is well settled that in the absence

of prejudice or surprise to the adversary, leave to amend a pleading should be freely granted unless the proposed amendment is "palpably insufficient or patently devoid of merit" (*Morris v Queens Long Island Medical Group, P.C.*, 49 AD3d 827; *GO. Alan Assoc. Inc. v Laser*, 44 AD3d 95 [2d Dept 2007]). Here, it is uncontested that the individual previously known as John Doe is in fact Mr. Michael Czech and was admittedly the operator of the horse ambulance when the subject accident occurred. Additionally, there has been no demonstration that any prejudice will be borne by the Defendants by granting leave to amend the complaint to add Mr. Czech as a party. Accordingly, the Plaintiffs' application is hereby **granted** and it is further ordered that service of the Supplemental and Amended Summons and Compliant as annexed herein is deemed good and sufficient service upon the Defendants.

Defendants' Cross-Motion for Summary Judgement

The Defendants cross-moves seeking dismissal of the within complaint pursuant to CPLR §3211(a)(7)(10) and CPLR §3212. With particular regard to the Plaintiffs' cause of action sounding in negligence, counsel argues that there are no triable issues of fact as to the Defendants' purported negligence and accordingly summary judgment is warranted (*see* Defendants' Memorandum of Law at pp. 4, 5). Counsel additionally contends that as the record clearly demonstrates that the Defendants acted reasonably under the circumstances and given that the Plaintiffs have failed to eliminate other likely and possible causes of the accident, the Plaintiffs cannot demonstrate a *prima facie* case of negligence requiring dismissal of the complaint (*see* Conti Affirmation in Support at ¶¶ 30, 32; *see* also Defendants' Memorandum of Law at pp. 6, 7, 8).

Counsel relies principally upon the deposition testimony of Plaintiff, James Culver. Counsel asserts that as Mr. Culver was admittedly not present when the alleged accident occurred, his testimony

can only be characterized as "surmise, conjecture and mere hope that the incident was caused by" the Defendants and is legally insufficient to demonstrate a *prima facie* case of negligence (*id.* at ¶¶21, 22, 23, 30, 32). Counsel additionally argues that the deposition testimony of Mr. Czech clearly establishes the absence of any negligence on the part of the Defendants as a matter of law (*id.* at ¶31).

As to the Plaintiffs' cause of action sounding in breach of contract, counsel for the Defendants' argues that the as allegations contained in the complaint are too vague to sustain such an action and given that Plaintiff Culver testified that he did not execute any contracts with NYRA for transport of the filly, that action should be **dismissed** (*see* Conti Affirmation in Support at ¶33; *see also* Defendants' Memorandum of Law at pp.13,14).

Decision

Within the context of a negligence action, in order to prove a *prima facie* case, the Plaintiff must show that the Defendants' negligence was a substantial factor in bringing about the events which caused the injury (*Derdiarian v Felix Contracting Corporation*, 51 NY2d 308 [1980]; *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980]). A Plaintiff, however, is not required to demonstrate "that the precise manner in which the accident happened, or the extent of the injuries, was foreseeable" (*Derdiarian v Felix Contracting Corporation, supra*). Depending upon the particular set of facts attendant to a specific case, various factors may be integral to determining legal or proximate cause (*id.*) Thus, "given the unique nature of the inquiry in each case, it is for the finder of fact to determine legal cause, once the court has been satisfied that a *prima facie* case has been established (*id.*; *Nallan v Helmsley-Spear, Inc., supra*).

Having reviewed the record, the Court finds that from the evidence presented, a jury could reasonably find that Mr. Czech negligently operated the horse ambulance under the circumstances,

which thereby caused the filly to sustain the particular injury which necessitated the euthanasia (*id.*). In the instant matter, Mr. Czech was fully cognizant of the filly's compromised physical condition prior to transport, as he clearly testified that he observed her walk onto the trailer during loading and that she appeared to be in distress and sore. He further stated that during transport, the very same door he had previously and personally secured, had unexpectedly opened which forced him to stop his vehicle to close said door. He stated that it was at this point that he observed the filly on her knees.

Further, the Court notes that the Defendants, in moving for summary judgment, have failed to demonstrate their entitlement to judgment as a matter of law with respect to the action sounding in negligence (*Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]). Contrary to Defendants' assertion that the testimony of Mr. Czech establishes the absence of any negligence on the part of the Defendants', as noted above, a careful review of said testimony reveals unresolved questions as to Mr. Czech's negligence in operating the ambulance and whether any negligence was a proximate cause of the injuries which necessitated resort to euthanasia.

Based upon the foregoing, the Defendant's application interposed pursuant to CPLR §3212 and which seeks an order granting summary judgment dismissing the cause of action sounding in negligence is hereby **denied**.

The Court now addresses the Defendants' motion to dismiss the Plaintiffs' cause of action sounding in breach of contract. On a motion to dismiss a complaint for failure to state a cause of action, the pleadings must be liberally construed (*Sotomayor v Kaufman, Malchman, Kirby & Squire,* LLP, 252 AD2d 554 [2d Dept 1998]; *Mayer v Sanders*, 264 AD2d 827 [2d Dept 1999]; CPLR §3026). In rendering a determination on such an application, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together

manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). The facts as alleged in the complaint "are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to such consideration" (*Sotomayor v Kaufman, Malchman, Kirby & Squire,* LLP, *supra*; *see also Morone v Morone*, 50 NY2d 481 [1980]).

In order to successfully plead a cause of action sounding in breach of contract, the compliant must allege the "provisions of the contract upon which the claim is based" (*Atkinson v Mobil Oil Corp.*, 205 AD2d 719 [2d Dept 1994]). Here, the Verified Complaint alleges "that in or about September of 2007, the Plaintiff entered into an agreement with Defendant, New York Racing Association, to harbor, stall, care for and maintain Plaintiff's filly 'POINT OF ORDER'." Said complaint goes onto allege that "Defendant, New York Racing Association, failed to adhere to terms of the contract and materially breached said contract when it failed to properly maintain, stall, harbor and transport the horse in a non-negligent manner, caused injury to said animal which ultimately cause [sic] the demise of said horse."

The Court, having reviewed the within complaint, as well as the deposition testimony of Mr. Culver, finds that the Plaintiffs claims are contradicted by the record and accordingly **grants** the Defendants application and dismisses the cause of action for breach of contract (*Sotomayor v Kaufman, Malchman, Kirby & Squire,* LLP, *supra*; *see also Morone v Morone*, *supra*). Initially, other than obliquely referring to a contract in the complaint, the Plaintiffs have failed to plead with specificity the provisions of the particular contract upon which the action is predicated (*Atkinson v Mobil Oil Corp.*, 205 AD2d 719 [2d Dept 1994]). Additionally, a review of the record reveals that Mr. Culver testified that there was no written agreement between himself and NYRA with respect to either housing or transporting the filly, and that all arrangements relative thereto were undertaken by the trainer, who in

turn dealt directly with NYRA. It is hereby

ORDERED, that the caption is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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JAMES CULVER, POINT OF ORDER, LLC
and DREAM TEAM RACING STABLE, INC.

Plaintiff,

-against-

MICHAEL CZECH and NEW YORK RACING
ASSOCIATION,

Defendants.

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It is further

ORDERED, that Defendant Michael Czech serve or Answer by September 29, 2009. It is further

ORDERED, that the parties are directed to appear in DCM on October 1, 2009 at 9:30 a.m. for a Pre-Trial Conference.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed herein are denied.

DATED: August 31, 2009
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

ENTERED
SEP 04 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

H:\DECISION - DISMISS\Culver v John Doe.wpd