

825 E. 57th St. Inc. v Save-a-Pet Animal Rescue & Adoption Ctr., Inc.

2010 NY Slip Op 32209(U)

August 16, 2010

Supreme Court, Suffolk County

Docket Number: 09694-2010

Judge: Emily Pines

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SHORT FORM ORDER

Index Number: 09694-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: HON. EMILY PINES
 J. S. C.

Original Motion Date: 03-19-2010 & 04-20-2010
 Motion Submit Date: 05-14-2010
 Motion Sequence No's.: 001 MD
 002 MD

_____ X
825 EAST 57TH ST. INCORPORATED,

Plaintiff,

-against-

**SAVE-A-PET ANIMAL RESCUE AND
 ADOPTION CENTER, INC.,**

Defendant.

Attorney for Plaintiff
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Attorney for Defendant
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ORDERED, that the plaintiff's motion brought by order to show cause for a preliminary injunction is denied; and defendant's cross-motion for dismissal of plaintiff's Complaint in its entirety pursuant to CPLR 3211(a)(7), CPLRE 3211(g), and NY Civil Rights Law § 76-a is denied.

Plaintiff, operator of a retail pet store located at 1320 Stony Broom Road, Stony Brook, New York, commenced the instant action by Order to Show Cause and by its Complaint seeks recovery under four (4) causes of action for: permanent injunction, trespass, interference with business relations, and defamation. The Complaint alleges, *inter alia*, that the defendant or those acting at its behest have protested outside and upon its property, harassing potential customers and/or steering them instead to defendant's pet adoption operation, which plaintiff perceives as a competing business. Defendant, a not-for-profit corporation offering pet rescue and adoption services, contends that it is

not responsible for the protests (although its individual members or employees have taken part therein in their individual capacities), that the protests are protected by the First Amendment, and that the plaintiff's action is a SLAPP suit subject to dismissal under CPLR 3211(g), and NY Civil Rights Law § 76-a.

Since a grant of defendant's cross-motion to dismiss the action would moot the plaintiff's application for injunctive relief, the Court will address the defendant's cross-motion first.

As recounted by the court in Harfenes v. Sea Gate Ass'n, Inc., 167 Misc. 2d 647, 650-651, 647 N.Y.S.2d 329, 331 (N.Y. Sup. Ct. 1995):

Legislation adopted in Chapter 767 of the Laws of 1992 amended to the Civil Rights Law, §§ 70-a and 76-a, which were specifically designed to protect those citizens who, usually before a government agency, publicly challenge applications by developers or other businesses for environmental and land use permits, leases, licenses or other approvals. The legislature recognized that such retaliatory lawsuits brought by developers and businesses, typically claiming damages in the millions of dollars and cloaked with accusations of libel, slander, interference with contract, and defamation, are rarely successful on the merits. However, they are likely to achieve their primary purpose of intimidating opponents and stifling public scrutiny and debate on matters of public policy.

Thus, in adopting the new anti-SLAPP law, the legislature has declared "it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." (L.1992, ch. 767, § 1.)

In the matter now before the Court, there are three issues that preclude a grant of the defendant's cross-motion to dismiss, although none have been raised or addressed by the plaintiff. Nevertheless, the Court will address them.

First, the defendant Save-a-Pet Animal Rescue and Adoption Center, Inc., by and through the sworn affidavits of individuals Dori Scofiel and Lynne Schoepfer submitted in support of the cross-motion to dismiss, emphatically and repeatedly state that the protests are not an activity of Save-a-Pet, the defendant organization herein, but rather that any participation in such protests by Scofiel and Schoepfer have been in their respective individual capacity. If the defendant organization is not engaged in protest, it is not clear upon what basis it may claim the protection of § 76-a of the Civil Rights Law. The purpose of the law is to safeguard the free speech of members of the public that are opposing government action. See, *Yeshiva Chofetz Chaim Radin, Inc., v Village of New Hempstead*, 98 F.Supp2d347 (2000). Since the defendant by its own affidavits contends that it has not engaged in such free speech activity or opposed the government action at issue, the SLAPP statute does not apply and is not a basis for dismissal. The Court recognizes that Scofiel and Schoepfer are President and Executive Director, respectively of the organization, and that plaintiff itself strenuously argues for the association of the individuals with the corporation; however, the Court is without jurisdiction to render any relief to individuals that are not parties to the instant action.

Second, even if the defendant organization had standing to seek the protection of § 76-a for its non-party members, the materials supporting the motion fail to assert that the protest was ever addressed to the “government body” responsible for issuing a pet dealer license under § 403 of New York’s Agriculture and Markets Law.

Section 76-a of New York’s Civil Rights Law offers protection to defendants in an “action involving public petition and participation” brought by a “public applicant or permittee.” The defendant asserts and plaintiff does not deny that plaintiff is a public permittee as a result of it having been issued a pet dealer license under § 403 of New York’s Agriculture and Markets Law. The Court notes that the record is devoid of any

proof of such license, or application for same, offered either by the plaintiff or defendant. In any event, defendant assumes that such permit has been issued, and for the purposes of this analysis, the Court will do the same. The question therefore becomes whether it is necessary for the defendant to have actually directed its protest and petition specifically to the “government body” that issued the license to plaintiff. Defendant’s papers are devoid of any representation that either Save-a-Pet or any of the individuals associated therewith ever addressed their protest to the appropriate (or any) license-issuing governmental body. Rather, the record created by the defendant herein describes protests that took place outside the plaintiff’s store and which were directed at educating the passing public and perhaps the patrons of the store as to its alleged manner of operating. Again, there is no indication that defendant or any of its members has petitioned the government to have the plaintiff’s pet dealer license revoked or suspended.

The law in New York is not fully settled with respect to construing §76-a so as to require a would-be SLAPP defendant to demonstrate actual contact with the “government body” in order to receive the protections of the statute. Some courts have noted that the SLAPP statute is in derogation of the common law and therefore must be narrowly construed. In *Harfenes, supra*, the Court denied application of the corollary statute (§70-a) because the defendants therein were missing an element necessary to receive the protection—“they never made any effort with respect to defeating and application or permission” as required under § 76-a. *see, also, Harini v Amper, 51 AD 3d 146, 854 NYS2d 126 (1st Dep’t 2008)*.

The Court is not obliged to resolve this question of law here, however, because a) the aforementioned standing defect addressed above by itself requires denial of the cross-motion, and b) because even if the defendant is not required to have addressed its protest directly to the government, it is not evident from the record that the protests were

themselves “materially related” to the plaintiff’s licensing status.

In order for § 76-a to apply, the plaintiff’s action must be “materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose [plaintiff’s application for or holding of a permit or license.]” Other than the conclusory offerings of counsel, which are themselves insufficient to support dismissal of the action, defendant’s papers fail to establish that defendant’s protests were concerned with the revocation of plaintiff’s pet dealer license. Rather, the extensive submissions of the defendant make the point that the defendant (or its members) oppose the existence of all retail pet stores. This position, which defendant indicates is supported by statutes in other jurisdictions that it indicates ban retail pet stores, is entitled to be freely expressed like any other opinion—however, such speech does not invoke § 76-a, and its particular requirements, since it is unrelated to whether plaintiff is entitled to possess a pet dealer license. Indeed, if we understand defendant’s political stance correctly, about which the Court takes no position whatsoever, defendant opposes not only the plaintiff’s operation of a pet store but also, by implication, the very licensing statute that permits pet stores to operate in New York itself.

Accordingly, defendant’s motion to dismiss the Complaint is denied.

Plaintiff’s motion for injunctive relief is also denied. A party is entitled to a preliminary injunction only where it demonstrates (1) a probability of success on the merits, (2) danger of irreparable harm in the absence of an injunction, and (3) a balance of the equities in its favor (*see, W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 438 N.Y.S.2d 761, 420 N.E.2d 953; *Milbrandt & Co. v. Griffin*, 1 A.D.3d 327, 766 N.Y.S.2d 588). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*see Gagnon Bus Co., Inc. v. Vallo Transp., Ltd., supra; Dental Health Assoc. v. Zangeneh*,


267 A.D.2d 421, 701 N.Y.S.2d 106; Blueberries Gourmet v. Aris Realty Corp., 255 A.D.2d 348, 680 N.Y.S.2d 557). Where the facts are in sharp dispute, a temporary injunction will not be granted (see, Blueberries Gourmet v. Aris Realty Corp., id.); Related Properties, Inc. v. Town Bd. of Town/Vill. of Harrison, 22 A.D.3d 587, 590, 802 N.Y.S.2d 221, 224 (2d Dep't 2005)

Plaintiff has failed to demonstrate that it will suffer irreparable harm in the absence of being granted injunctive relief. Although the Court has declined to apply § 76-a of the New York Civil Rights law in the context of defendant's cross-motion, the Court does not find that defendant's protests, to the extent lawful, are not entitled to First Amendment protection. Even if, as plaintiff contends, defendant's speech is merely in furtherance of a competing commercial enterprise, commercial speech (and here the speech unquestionably is predominantly political speech) is likewise entitled to constitutional protection provided that it is not misleading or related to unlawful activities. See, Central Hudson Gas & Electric Corp. v. Public Service Comm., 447 US557, 100 S.Ct. 2343 (1980).

With respect to a balancing of the equities, the Court is reluctant to and will not restrict the exercise of free speech in a public place absent extraordinary circumstances.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 16, 2010
Riverhead, New York


EMILY PINES
J. S. C.