

Garner v Doggie Love L.L.C.

2011 NY Slip Op 30072(U)

January 13, 2011

Supreme Court, Queens County

Docket Number: 16993/10

Judge: Allan B. Weiss

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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 2

	x	
LAURA GARNER and ROGER HARDON,		INDEX NO. 16993/10
Plaintiffs,		MOTION SEQ. NOS. 1 and 2
-against-		BY: WEISS, J.
DOGGIE LOVE L.L.C., NILO SILVA a/k/a NILO MATHIAS, MARLA ABRAMS, JOHN DOE #1 a/k/a SAMUEL, and JOHN DOE #2 a/k/a JUNIOR, the last two names being fictitious and unknown to the Plaintiff,		DATED: 1/13/11
Defendants.		
	x	

Plaintiffs Laura Garner and Roger Hardon commenced this action to recover damages arising out of the death of their pet, a French Bulldog named Percy, by filing a summons and verified complaint on July 2, 2010. Defendants DoggieLove LLC, Nilo Silva also known as Nilo Mathias, Marla Abrams and John Doe #1, also known as Samuel, and identified in the motion papers as Samuel Reiss, by notice of motion dated August 9, 2010, move to dismiss the complaint on the grounds of failure to state a cause of action pursuant to CPLR 3211(a)(7). Defendants Abrams and Silva also raised defenses in their affidavits with respect to the service of the summons and complaint. The motion to dismiss had a

return date of September 8, 2010, and was administratively rescheduled to September 15, 2010.

Thereafter, a supplemental summons and amended complaint was served on Marla Abrams on August 26, 2010, and on counsel for the moving defendants on August 30, 2010, and was filed with the court on August 30, 2010. The supplemental summons and amended complaint names as defendants DoggieLove LLC, Nilo Silva also known as Nilo Mathias, Marla Abrams, Samuel Reiss and John Doe #2, also known as Junior (Junior). There is no evidence as to whether Junior was served with process with either the initial summons and complaint or the amended summons and complaint.

Defendants DoggieLove LLC, Nilo Silva also known as Nilo Mathias, Marla Abrams and Samuel Reiss move, by notice of motion dated September 20, 2010, to dismiss the amended complaint on the grounds that it was not timely served and filed pursuant to CPLR 3025, and in the alternative, seek to dismiss the amended complaint on the grounds that it fails to state a cause of action, pursuant to CPLR 3211(a)(7). In support of this motion, defendants have submitted the copies of the affidavits and supporting documents previously submitted in support of the initial motion to dismiss.

The initial complaint alleges that defendant Nilo Silva, also known as Nilo Mathias (Nilo Silva) and Marla Abrams are the owners of DoggieLove LLC, and that John Doe #1, also known as Samuel, and John Doe #2, also known as Junior, were and are employees, agents and servants of DoggieLove LLC, Mr. Silva and Ms. Abrams. The initial

complaint alleges seven causes of action against all defendants for breach of contract, bailment and agistment, negligence, “respondeat superior liability,” gross negligence, punitive and exemplary damages, and intrinsic value damages.

Plaintiffs, in the amended complaint, allege that Nilo Silva is the sole owner of DoggieLove LLC, and that Samuel Reiss and Junior, were and are the employees of DoggieLove LLC, Nilo Silva, and Marla Abrams. The first cause of action of the amended complaint is for breach of contract against DoggieLove LLC and Nilo Silva; the second cause of action for bailment and agistment is against DoggieLove LLC and Nilo Silva; the third cause of action for negligence is against all defendants; the fourth cause of action against DoggieLove LLC is for “respondeat superior liability”; and the fifth cause of action against all defendants is for gross negligence. Plaintiffs, in the wherefore clause of the amended complaint, seek to recover the sum of at least \$125,000.00 on the first, second, third and fourth causes of action and also seek to recover punitive damages, together with legal fees, costs and disbursements.

It is well settled that an amended complaint supersedes the original complaint, thus rendering without legal effect the defective earlier pleading (*see Chalasani v Neuman*, 64 NY2d 879 [1985]; *Elegante Leasing, Ltd. v Cross Trans Svc, Inc.*, 11 AD3d 650 [2004]). In the Second Department, the service of an amended complaint does not render academic the motion to dismiss, addressed to the merits, of the initial complaint (*Terrano v Fine*, 17 AD3d 449 [2005]; *Livadiotakis v Tzitzikalakis*, 302 AD2d 369 [2003]). Here, as

defendants' initial motion to dismiss the complaint pursuant to CPLR 3211(a)(7) is not addressed to the merits, the initial motion is now moot, and the initial complaint has been superseded by the amended complaint.

Therefore, defendants' motion to dismiss the initial complaint is denied as moot.

That branch of defendants' motion which seeks to strike the amended complaint on the grounds that it was not timely served and filed with the court, is rejected. CPLR 3025(a) provides that "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." Where a defendant moves to dismiss a complaint, its time to answer is extended, thus extending the time in which plaintiff can amend its complaint as of right (*Johnson v Spence*, 286 AD2d 481 [2001]; *STS Management v New York State Department of Taxation and Finance*, 254 AD2d 409 [1998]). Therefore, as plaintiffs' service of the amended complaint was timely, that branch of the defendants' motion which seeks to strike the amended complaint, is denied.

Defendants Nilo Silva, Marla Abrams and Samuel Reiss, in the affidavits submitted herein, raise jurisdictional defenses pertaining to the service of the initial summons and complaint. These defendants, however, omitted this defense from the notice of motion. Furthermore, they have not established that the service of the initial summons and complaint

was defective. Mr. Silva was served with process pursuant to CPLR 308(4) on July 12, and July 13, 2010. He does not deny that he resides at the Astoria address where service was made, and does not deny receipt of the summons and complaint that were affixed to his door and mailed to his residence. Therefore, the fact that Mr. Silva states he was on vacation and, thus, temporarily away from his residence does not raise any jurisdictional defense to this action.

Defendant Samuel Reiss states in his affidavit that he was not served with process in this action. However, counsel for defendants, in a footnote in the memorandum of law, states that DoggieLove has agreed to represent Mr. Reiss and, therefore, waives proper service of the summons and complaint in this matter on his behalf.

Defendant Marla Abrams was personally served with process on Saturday, July 10, 2010. Ms. Abrams states that plaintiffs attempted to serve her with process on a Saturday, and “as a faithful member of the Jewish religion, however, I understand that service of process upon me on a Saturday is not legal or valid within the State of New York.” The affidavit of service states that service was made, pursuant to CPLR 308(2), by leaving a copy of process with David Rukaj, a doorman, at Ms. Abrams’ residence, and by mailing a copy of said process to her residence on July 12, 2010. Ms. Abrams has failed to establish that the service of process on Saturday, July 10, 2010 was done with malicious intent, and, therefore, service of process on her was valid (*see* General Business Law § 13; *Matter of*

Kushner, 200 AD2d 1, 2 [1994]; *Chase Manhattan Bank v Powell*, 111 Misc 2d 1011 [1981]).

Defendant DoggieLove LLC was served with the initial summons and complaint on July 9, 2010, pursuant to Section 303 of the Limited Liability Company Law.

On a motion to dismiss pursuant to CPLR 3211(a)(7), “the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference” (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]). The court’s “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, a motion for dismissal will fail” (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). The court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion and determine only whether the facts as alleged fit within any cognizable legal theory” (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]).

Plaintiffs allege in the amended complaint that they entered into an oral agreement on July 3, 2009 with defendants DoggieLove LLC, and Nilo Silva, to care for their dog Percy and be responsible for his health, maintenance and welfare from Friday afternoon, July 10, 2009, to Saturday evening, July 11, 2009, for the fee of \$50.00 per day. Plaintiffs allege that these defendants agreed to board Percy, to provide him with sustenance,

attend to any medical needs that may arise while he was in their care, to walk him, to play and socialize with him, and to transport him from and to the plaintiffs' residence on West End Avenue in Manhattan. Plaintiffs allege that on July 10, 2009 at approximately 2:30 P.M., defendants' employee, agent, or servant, Samuel Reiss, picked up Percy and transported him to Mr. Silva's residence located at 2047 21st Street in Astoria, New York, for care and overnight boarding; that on Saturday, July 11, 2009, defendants' employee, agent, or servant, John Doe #1, also known as Junior, transported Percy from Silva's residence to the plaintiffs' residence in the non-air conditioned rear portion of a gold 2006 Ford Ecoline E350 Super Duty van; that at approximately 5:10 P.M., Junior walked into the plaintiffs' apartment building carrying Percy in his arms; that Percy was lying on his back and appeared to have difficulty breathing and appeared to be gasping for air; that this was observed by the building's doorman, Carlos Alvarado, who inquired as to the dog's appearance and suggested that he be taken to a veterinarian; that Junior ignored Mr. Alvarado and obtained the key to the plaintiffs' apartment; that plaintiffs' neighbors, the Hon. Pierre Leval and his wife, Susana Leval, witnessed Junior carrying Percy from the elevator; that the dog was lying on his back, with his legs straight up and was gasping for air; that the Levals' inquiries as to the dog's well being were rebuffed by Junior; that Junior placed the dog on the floor and opened the door to the plaintiffs' apartment; that the dog was unable to move, and that Junior carried him inside and closed the door; that Junior left the apartment and returned the key to the doorman 5 to 10 minutes later, at which time he assured the doorman

that the dog was “fine,” and left in the van that had been parked at a hydrant. Plaintiffs allege that their regular dog walker, Jay Ward, arrived at the apartment at approximately 8:00 P.M., at which time he discovered Percy lying dead on a towel in front of an air conditioner. Mr. Ward took Percy to a nearby veterinary center, where a post-mortem examination was made, and it was determined that Percy died from complications of hyperthermia (prolonged heat exposure). Plaintiffs allege that Percy, a French Bulldog, was a brachycephalic breed, whose shorter respiratory tract and other anatomical features can compromise the ability to regulate their body temperature, hinder respiration, and become life threatening when exasperated by exposure to excessive heat.

Mr. Silva, Ms. Abrams and Mr. Reiss each state in their respective affidavits that DoggieLove LLC’s sole “owner” (member) is Nilo Silva. Mr. Silva states that he purchased DoggieLove LLC from its former owner in 2006 and that he is the sole shareholder; that DoggieLove LLC has never had any employees and only hires independent contractors; and that he “had no personal involvement in any of the acts or omissions alleged to have taken place in connection with the plaintiffs’ dog’s death.” Ms. Abrams states in her affidavit that she is an independent contractor and that she has never had any ownership interest in, or managerial authority with respect to DoggieLove, LLC; and that she “had no personal involvement in any of the acts or omissions alleged to have taken place in connection with plaintiffs’ dog’s death.” Mr. Reiss states in his affidavit that he is an independent contractor and that he has never had any ownership interest in, or managerial

authority with respect to DoggieLove LLC; and that he “had no personal involvement in any of the acts or omissions alleged to have taken place in connection with plaintiffs’ dog’s death.”

Although the amended complaint names Marla Abrams a defendant, it does not allege that she is an owner or member of DoggieLove LLC, or that she was the employer of Samuel Reiss or Junior, or that she entered into any agreement with plaintiffs. The amended complaint is also devoid of any allegations that Marla Abrams transported, boarded, or provided any services to plaintiffs with respect to their dog Percy at any time between July 10, 2009 and July 11, 2009. Defendants’ motions to dismiss both plaintiffs’ amended complaint, in its entirety as to Marla Abrams, is granted.

Plaintiffs allege that Mr. Nilo is an owner (member) of DoggieLove LLC. A member of a limited liability company may not be held personally liable on contracts entered into by his or her company, provided he or she did not purport to bind himself or herself individually under such contracts (*Panasuk v Viola Park Realty, LLC*, 41 AD3d 804 [2007]; *Kopec v Hempstead Gardens*, 264 AD2d 714, 715-716 [1999]). Here, plaintiffs allege that they entered into an oral agreement and a bailment agreement with DoggieLove LLC and with Nilo Silva. Although Mr. Silva states in his affidavit that “[a]s evidenced by the allegations in the Complaint, however, I had no personal involvement in any of the acts or omissions alleged to have taken place in connection with plaintiffs’ dog’s death,” he does not deny entering into the oral agreement with the plaintiffs, and does not state whether that

agreement was made on behalf of DoggyLove LLC, or in his individual capacity. The court, therefore, finds that the amended complaint states a cause of action for breach of contract against DoggieLove LLC and Nilo Silva.

The second cause of action of the amended complaint properly alleges an action for bailment for mutual benefit between the plaintiffs and defendants DoggieLove LLC and Nilo Silva. Mr. Silva does not deny entering into the bailment agreement, and he fails to state in his affidavit whether he entered into the agreement solely on behalf of DoggieLove LLC, or in his individual capacity.

The amended complaint, however, fails to state a claim for an agistment. An agistment contract is a subcategory of bailment contracts, under which someone (the agistor) agrees to keep and care for the animals of another. It is a contract for taking in and feeding horses or other cattle on pasture land in return for payment of consideration, such as a weekly or monthly fee (*see* 3 NY Jur 2d, Animals § 12). An agreement to care for and board a dog, however, does not constitute an agistment contract. Therefore, that portion of defendants' motion which seeks to dismiss the second cause of action of the initial and amended complaint is granted to the extent that plaintiffs seek to recover damages based upon the breach of an agistment.

The third cause of action of the amended complaint which seeks to recover damages for negligence, alleges that the defendants and their employees breached a duty owed to plaintiffs to treat their dog with reasonable care, separate and apart from the

contractual agreement. In order to plead a cause of action for negligence, a plaintiff must show that a defendant owed a duty to the plaintiff, that defendant breached the duty, and that plaintiff was injured as a proximate result of defendant's breach (*see Friedman v Anderson*, 23 AD3d 163, 165 [2005]). "[A] claim arising out of an alleged breach of contract may not be converted into a tort action absent the violation of a legal duty independent of that created in the contract" (*Givoldi, Inc. v UPS*, 286 AD2d 220, 221 [2001]). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent on the contract" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389 [1987]). Plaintiffs' bare assertion that defendants DoggieLove LLC and Silva owed them a duty of care separate and apart from the contractual agreement, without any additional factual allegations, is insufficient to state a claim for negligence. Therefore, that branch of defendants' motion which seeks to dismiss the third cause of action, is granted as to defendants DoggieLove LLC and Nilo Silva.

Samuel Reiss is identified in the initial complaint and amended complaint as an employee, agent or servant of DoggieLove LLC and Nilo Silva. Both Mr. Silva and Mr. Reiss assert that Reiss has worked as an independent contractor for DoggieLove LLC. It is well established that a person who hires an independent contractor is not liable for injury caused to a third party by the independent contractor's negligent acts (*see Rosenberg v Equitable Life Assur. Socy.*, 79 NY2d 663, 668 [1992]). Whether an individual is an independent contractor or employee must be determined on an ad hoc basis (*see Matter of*

Want Ad Digest [Roberts], 105 AD2d 895, 896 [1984]) and typically involves a question of fact as to who controls the methods and means by which the work is to be done (*see e.g. Matter of Rivera [State Line Delivery Serv.--Roberts]*, 69 NY2d 679, 682 [1986], *cert denied* 481 US 1049 [1987]). Also of importance, however, is whether the employer furnishes the tools or equipment, whether payments are made in lump sums and whether Social Security withholdings and taxes are withheld from such payments (*see Stevens v Spec, Inc.*, 224 AD2d 811, 811-812 [1996]; *Matter of Etherington v Empire Improvements*, 55 AD2d 762 [1976]).

Here, defendants, in support of their claim that Samuel Reiss is an independent contractor, have submitted redacted 1099 forms for Samuel Gomes Reis for tax years 2008 and 2009, which show that no Social Security or tax payments were withheld. These 1099 forms, as well as defendants' affidavits, are insufficient to conclusively establish that Mr. Reiss was an independent contractor, and not an employee of DoggieLove LLC in July 2009. The question of whether or not an employment relationship exists is a factual one, and no one fact can be exclusively relied upon to prove or disprove the relationship (*see generally Greene v Osterhoudt*, 251 AD2d 786 [1998]; *Etherington v Empire Improv., Inc., supra*).

Plaintiffs allege that Percy was transported by Mr. Reiss to either Silva's Astoria residence, or to the non-air conditioned basement located at 412 West End Avenue in Manhattan, that was rented to either DoggieLove LLC or Mr. Silva. Although Mr. Reiss

asserts that he had no personal involvement with the alleged acts or omissions that caused the death of plaintiffs' dog, he does not deny that he initially transported Percy from plaintiffs' apartment, and does not state where, or to whom, Percy was delivered for boarding. Therefore, as it cannot be determined at this stage whether Mr. Reiss is an independent contractor, plaintiffs' amended complaint sufficiently alleges a claim for negligence against Mr. Reiss.

The fourth cause of action of the amended complaint entitled "respondeat superior liability" alleges that DoggieLove LLC was the employer of Silva, Reiss, and Junior. Plaintiffs allege that Samuel Reiss and Junior negligently transported and then placed Percy in a situation where he was caused to overheat and to enter into respiratory distress, and that Junior, upon delivery of Percy to the plaintiffs' apartment, ignored the dog's obvious signs of distress and failed to seek life saving medical attention. Plaintiffs, thus, seek to hold DoggieLove LLC, liable for the negligent acts of Samuel Reiss and Junior.

Pursuant to the doctrine of respondeat superior, liability for an employee's tortious acts may be imputed to the employer when they were committed "in furtherance of the employer's business and within the scope of employment" (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment" (*Davis v Larhette*, 39 AD3d 693, 834 NYS2d 280 [2007]; see *Smith v Midwood Realty Assoc.*,

289 AD2d 391, 391-392 [2001]). Those acts which the employer could reasonably have foreseen are within the scope of the employment and, thus, give rise to liability under the doctrine of respondeat superior (*see Riviello v Waldron*, 47 NY2d 297, 302-305[1979]), even where those acts constitute an intentional tort (*cf. Naegele v Archdiocese of New York*, 39 AD3d 270 [2007]) or a crime (*see N.X. v Cabrini Med. Ctr., supra; Sports Car Centre of Syracuse v Bombard*, 249 AD2d 988 [1988]).

As defendants have not conclusively established that Samuel Reiss was not the employee of DoggieLove LLC, and have not conclusively established that Junior was not an employee of DoggieLove LLC, that branch of defendants' motion which seeks to dismiss the fourth cause of action of the amended complaint as to defendant DoggieLove LLC, is denied.

In the fifth cause of action of the amended complaint for gross negligence against all defendants, plaintiffs allege that Silva, Reiss and Junior acted with intentional and reckless disregard of the rights of the plaintiffs when they intentionally placed Percy in a situation where he would overheat and enter into respiratory distress, and when they intentionally refused to seek medical care for Percy. It is alleged that Junior acted with wanton, intentional and reckless disregard of the plaintiffs' and Percy's welfare when he knowingly intentionally refused to seek any medical care or veterinary assistance for Percy, after seeing that he was in obvious distress, and deliberately ignored repeated expressions of concern by witnesses to the dog's distress.

The court finds that plaintiffs' allegations are insufficient to state a claim for gross negligence against defendants DoggieLove LLC, Silva, and Reiss, as they are based upon the alleged conduct of Junior. Therefore, that branch of defendants' motion which seeks to dismiss the fifth cause of action of the amended complaint for gross negligence is granted.

In view of the foregoing, defendants' motion to dismiss the initial complaint is denied as moot. Defendants' motion to strike the amended complaint is denied. Defendants' request to dismiss the amended complaint is granted in its entirety as to Marla Abrams. Defendants' request to dismiss the amended complaint is further granted to the extent that the portion of the second cause of action which seeks to recover damages for an agistment is dismissed; the third cause of action for negligence is dismissed as to defendants' DoggieLove LLC and Silva; and the fifth cause of action for gross negligence is dismissed as to DoggieLove LLC, Silva and Reiss. The remainder of defendants' motion is denied in all other respects.

Settle one order.

J.S.C.