

Cohen v Rostron

2012 NY Slip Op 30081(U)

January 5, 2012

Sup Ct, Nassau County

Docket Number: 15036/11

Judge: Anthony L. Parga

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY
PRESENT:

HON. ANTHONY L. PARGA
JUSTICE

-----X **PART 6**
MARY ANN COHEN a/k/a MARY ANN MCGRAFFILL,

Plaintiff,

INDEX NO. 15036/11

-against-

MOTION DATE: 11/22/11
SEQUENCE NO. 001

BRITTANY ROSTRON, PROJECT SAGE HORSE
RESCUE, INC. and TWO COUSINS FARMS, LLC,

Defendants.

-----X	
Order to Show Cause, Affs, & Exs.....	1
Supplemental Affirmation in Support & Exs.....	2
Affirmation in Opposition & Exs.....	3
Reply Affirmation & Exs.....	4

Upon the foregoing papers, plaintiff's motion, brought by Order to Show Cause, for a permanent injunction directing the defendants to deliver custody of Corona, a male chestnut gelding horse, and for a declaratory judgment declaring the rights and remedies between the parties as they pertain to custody and ownership of Corona, is denied. The temporary restraining order directing that the defendants, their agents, servants, employs, and anyone acting on their behalf in a construction capacity, are restrained and enjoined from removing from the State of New York, transferring, selling, pledging, leasing, assigning, or otherwise disposing of Corona shall remain in effect pending the final outcome of this litigation.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for permanent injunctive relief, trespass to chattel, conversion, and intentional infliction of emotional distress.

The instant proceeding arises out of an adoption agreement, dated August 25, 2011, for a horse known as “Corona,” which was entered into between the plaintiff and defendants Project Sage Horse Rescue (hereinafter “Project Sage”) and Brittany Rostron. Plaintiff alleges that the adoption agreement was unlike a lease agreement in that the adoption agreement transferred legal title of Corona to the plaintiff. Plaintiff contends that transfer of title to the plaintiff was conditioned upon the adequate care of Corona by the plaintiff. Plaintiff further contends that defendants breached the adoption agreement by wrongfully taking possession of Corona and denying plaintiff access to Corona.

Defendant Project Sage is a non-profit organization dedicated to preventing the inhumane treatment and slaughter of horses. Defendant Rostron is Project Sage’s director. Defendant Two Cousins Farms, LLC (hereinafter “Two Cousins”) is the stable where Project Sage keeps many of its horses. Defendants contend that the adoption agreement did not transfer ownership of Corona to the plaintiff. Defendants contend that while Corona was “placed” with plaintiff as its “caregiver,” the adoption agreement’s express terms restrict plaintiff from selling, assigning, transferring or leasing Corona. The agreement also prevents the caregiver from bequeathing the horse to her heirs upon the caregiver’s death, but instead states that within ten days of the caregiver’s death, the “horse must be released only to Project Sage.” Defendants contend that while Project Sage grants certain custody rights to able and loving caretakers, those rights are subject to specific restrictions that permit Project Sage to maintain control over the well being of its horses. Defendants contend that in return for paying an adoption fee and the costs of the horse’s upkeep, an individual who becomes a horse’s “caregiver” is granted an exclusive, or near exclusive, right to ride the horse. Defendants contend that the “adoption fee” was waived for the plaintiff as long as the defendants could continue to give riding lessons using Corona on Wednesdays and Sundays. Defendants note that the adoption agreement does not refer to plaintiff as an “owner” of the horse, but rather refers to her as a “caregiver.” Defendants argue that the adoption agreement did not transfer title of Corona to plaintiff and that plaintiff should not be granted exclusive possession of the horse, denying Project Sage of all of the rights it expressly retained in the adoption agreement at issue.

The adoption agreement specifically states that Corona may not be moved out of New

York State by its Caregiver, without the express written permission of Project Sage. It further states that the caregiver may move the horse to a new location within New York State if (1) Project Sage is informed in writing 30 days prior to the proposed move; (2) Project Sage approves the new facility prior to the proposed move; and (3) Project Sage executes a written agreement authorizing such a move. Additionally, the agreement states that the horse will reside at, and will not be moved from, Two Cousins Farm without the written approval of Project Sage.

Plaintiff contends that on or about September 13, 2011, the plaintiff “in writing and verbally” requested permission to remove Corona from Two Cousins to Pal-O-Mine Equestrian Center (hereinafter “Pal”) for three days from September 29, 2011 to October 1, 2011. Plaintiff contends that permission was granted by Project Sage. Thereafter, on October 1, 2011, the plaintiff contends that she communicated in writing her desire to relocate Corona from Two Cousins to Pal because the plaintiff believed the conditions and circumstances at Pal were better for Corona. At said time, plaintiff was directed by Project Sage to return Corona to Two Cousins. Plaintiff contends that she did return Corona to Project Sage on October 1, 2011. Plaintiff alleges, *inter alia*, that as a result of her request to move Corona, Project Sage unilaterally “terminated” the adoption agreement and removed Corona from Two Cousins to an unknown location. Plaintiff contends that defendants did not want Corona moved to Pal because Project Sage wanted to continue to use the horse for riding lessons two days a week.

Defendants contend that while Project Sage agreed to permit plaintiff to transfer Corona to another facility in September 2011, Project Sage agreed only for a transfer of the horse for one weekend. Defendants contend that on October 1, 2011, plaintiff announced her intention to refuse to return Corona to the stable designated by Project Sage, in violation of the terms of the adoption agreement. Defendants contend that it was only after plaintiff was reminded about the terms of the agreement that plaintiff returned Corona and gave Project Sage thirty days notice of her request to relocate Corona. At the time that plaintiff returned Corona, the defendants contend that Corona was sweating and acting abnormally, conditions that were abated when a “cribbing collar” which had been placed on Corona had been removed. Defendants contend that “given concerns for the safety of Corona,” Project Sage terminated the adoption agreement with plaintiff and relocated Corona.

While plaintiff's application herein requests a permanent injunction directing the defendants to deliver custody of Corona to the plaintiff, plaintiff has not made a prima facie showing of entitlement to a permanent injunction awarding her custody of Corona, as plaintiff has failed to demonstrate that she is the sole owner of Corona or that she is entitled to sole possession of Corona. Contrary to plaintiff's contentions, it is not "undisputed" that the adoption agreement transferred ownership of Corona to the plaintiff. Defendant disputes same, and, more importantly, the adoption agreement is silent as to the ownership of Corona and does not specifically transfer title of said horse to the plaintiff. Additionally, the agreement specifically states that Corona is to remain at Two Cousins Farm unless the caregiver gets written permission from Project Sage to move the horse to another location within New York State.

Further, while the plaintiff's Order to Show Cause initially requests a permanent injunction, within her Affirmation in Support of same, plaintiff primarily argues that she is entitled to a preliminary injunction. The elements required for a preliminary injunction are: (i) likelihood of success on the merits of the underlying claim; (ii) irreparable injury in the absence of the injunction; and (iii) a balance of the equities in the movant's favor. (*Arcimone-Makinano v. Britton Property, Inc.*, 83 A.D.3d 623, 920 N.Y.S.2d 362 (2d Dept. 2011); *Hightowner v. Reid*, 5 A.D.3d 440, 772 N.Y.S.2d 575 (2d Dept. 2004); *See also, Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860, 552 N.Y.S.2d 918 (1990); *Interfaith Medical Center v. Shahzad*, 124 A.D.2d 557, 507 N.Y.S.2d 702 (2d Dept. 1986)). The purpose of a preliminary injunction is to preserve the status quo until a decision is reached on the merits. (*Arcimone-Makinano v. Britton Property, Inc.*, 83 A.D.3d 623, 920 N.Y.S.2d 362 (2d Dept. 2011)).

The plaintiff has failed to demonstrate the elements necessary to obtain a preliminary injunction. Plaintiff has not demonstrated a likelihood of success on the merits of the underlying claim, as the adoption agreement does not specifically state that the ownership of Corona was transferred from Project Sage to the plaintiff or that plaintiff is entitled to sole possession of the horse. The adoption agreement at issue merely states that Project Sage agrees to "place Corona to caregiver" for "the purpose of providing a safe, health and loving environment for the horse" and also states that such placement with the caregiver is agreed to in exchange for the caregiver's agreement "to comply with the terms of the Placement Contract." In addition, the adoption

agreement specifically states that Corona shall remain at Two Cousins Farm and expressly gives Project Sage the right to remove the horse without notice to the plaintiff.

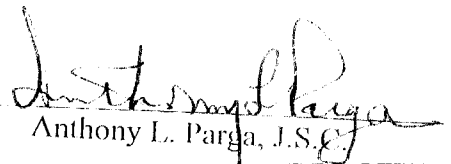
In addition, there is no evidence that there will be irreparable harm to the plaintiff, or to the horse, Corona, absent a preliminary injunction. To ensure same, plaintiff has been awarded a temporary restraining order, restraining and enjoining the defendants their agents, servants, employs, and anyone acting on their behalf in a construction capacity, from removing from the State of New York, transferring, selling, pledging, leasing, assigning, or otherwise disposing of Corona, and same shall remain in effect pending the final outcome of this litigation.

Lastly, the plaintiff has failed to demonstrate a balance of equities in her favor. The adoption agreement specifically states that Corona shall remain at Two Cousins Farm and expressly gives Project Sage the right to remove the horse without notice to the caregiver at the sole discretion of Project Sage, if in the reasonable opinion of Project Sage the caregiver is failing to comply with the terms and conditions of the agreement. The agreement does not give plaintiff permission to possess the horse at a location of her choosing without the express written permission of Project Sage.

Further, with respect to plaintiff's request for a declaratory judgment declaring the rights and remedies between the parties as they pertain to ownership and custody of Corona, sufficient evidence has not been presented herewith for the Court to make such a determination, and there are also questions of fact regarding same which prevent such a determination. Further, the Court notes that discovery in this matter has not yet begun and a preliminary conference has not yet been held.

Accordingly, plaintiff's motion is denied. Plaintiff is directed to serve a copy of this order upon the Differentiated Case Management Part ("DCM") Case Coordinator of the Nassau County Supreme Court, and upon counsel for the defendants, within twenty (20) days of the date of this Order. The parties shall appear for a Preliminary Conference on **February 15, 2012 at 9:30 A.M.** in the DCM Part, Nassau County Supreme Court, to schedule all discovery proceedings.

Dated: January 5, 2012


Anthony L. Parga, J.S.C.

ENTERED
JAN 09 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Cc: Andrew R. Bensi, Esq.
2950 Hempstead Turnpike, Suite 201
Levittown, NY 11756

SNR Denton US LLP
1221 Avenue of the Americas
New York, NY 10020