

Frank v Animal Haven, Inc.

2012 NY Slip Op 30441(U)

February 21, 2012

Sup Ct, NY County

Docket Number: 108894/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: How John A. Madew
Justice

PART 11

Marilyn Frank

INDEX NO. 108894/09

Animal Haven, et al

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the attached memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 21, 2012

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 11

-----X

MARILYN FRANK,

Plaintiff

Index No. 108894/09

-against-

ANIMAL HAVEN, INC., 172 EAST 4TH STREET
TENANTS CORP., BUCHBINDER & WARREN LLC,
BEN JOSH MANAGEMENT CORPORATION,
ANDREW SKIMBIRAUSKAS, MELISSA
MCNAMARA, ABDUSSEMED IBRAHIM, and LISA
STERNLICHT,

Defendant.

-----X

JOAN A. MADDEN, J.:

FILED

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Animal Haven, Inc. ("Animal Haven") moves to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7) and based on documentary evidence. Plaintiff Marilyn Frank ("Frank") opposes the motion, and defendants 172 East 4th Street Tenants Corp. and Buchbinder & Warren LLC partially oppose the motion. For the reasons below, Animal Haven's motion to dismiss is granted.

Background

The following facts are based on the allegations in the amended verified complaint and the documentary evidence submitted on the motion.

Animal Haven is a domestic not-for-profit corporation existing under and by virtue of the laws of the State of New York. Prior to January 25, 2006, Animal Haven, an animal shelter, owned and cared for a certain large breed male dog, known as "Jackpot". On January 25, 2006, Animal Haven and defendant Andrew Skimbirauskas ("Skimbirauskas"), entered into an adoption guardianship contract (the "Adoption

Contract”), whereby Skimbirauskas became the lifelong guardian of Jackpot, then a 4 ½ month old puppy. According to the Adoption Contract, “I [Skimbirauskas] legally contract with Animal Haven to become the lifelong guardian of: Jackpot”. The Adoption Contract also provides, in relevant part:

I [Skimbirauskas] agree to provide proper food, fresh water, clean indoor shelter and humane treatment for my pet. I [Skimbirauskas] agree to keep my pet on my property or within my control at all times. I [Skimbirauskas] agree to be responsible for annual veterinary care, vaccinations, and deworming of my pet. I [Skimbirauskas] agree that the adoption of this pet is at my own risk and that the destruction of any personal or private property is my own responsibility...I [Skimbirauskas] agree that Animal Haven has the right to investigate my home either by a phone call or a home visit. If the terms of this contract are not being met, this pet may be removed from my home at the discretion of Animal Haven. I understand that Animal Haven cannot guarantee the health, temperament or training of [Jackpot], and hereby agree to release Animal Haven from all liability once [Jackpot] is in my possession.

Further, at the bottom of the Adoption Contract, in bold, capitalized letters, it states:

I HAVE READ, UNDERSTOOD AND AGREE TO ALL TERMS OF THIS CONTRACT FOR ADOPTION/GUARDIANSHIP. I AGREE THAT ON THIS DATE, THE PET I AM ADOPTING AND BECOMING GUARDIAN OF APPEARS TO BE IN GOOD CONDITION.

I AGREE THAT I AM MAKING A LIFETIME COMMITMENT TO THIS PET, AND IF AT ANY TIME I AM UNABLE TO KEEP THIS COMMITMENT, MY PET MUST BE RETURNED TO ANIMAL HAVEN; MY PET MAY NOT BE GIVEN AWAY TO ANY OTHER PERSON AND NO REFUNDS WILL BE REISSUED FOR RETURNED ANIMALS.

Skimbirauskas currently resides with defendant Melissa McNamara (“McNamara”) in the building located at 172 East 4th Street, County of New York, New York, (“the Building”), Apartment 5I, where together they care for Jackpot.

Skimbirauskas and McNamara sublet Apartment 5I from its owner, defendant Abdussemed Ibrahim. Plaintiff Marilyn Frank ("Frank") also resides in the Building, in Apartment 10I. The Building is owned by defendant 172 East 4th Street Tenants Corp., and managed by defendant Buchbinder & Warren LLC.¹

This action arises out of an incident that occurred on April 16, 2008, in the lobby of the Building, when Jackpot bit Frank in the thigh, causing a deep puncture wound that had to be treated at a hospital emergency room. Frank also alleges that she fell and broke her wrist while in her apartment two days later as a result of a weakened condition due to the wound. The original verified complaint alleged that Jackpot is owned by Skimbirauskas and McNamara. In March 2011, Frank moved for leave to amend the complaint, and to serve a supplemental summons to include Animal Haven as a party defendant. By decision and order dated May 16, 2011, the Court granted the motion without opposition. The amended complaint alleges that in addition to Skimbirauskas and McNamara, Animal Haven is the owner of Jackpot. The amended complaint contains allegations against Animal Haven based on a theory of negligence as owner of Jackpot.

Animal Haven now moves to dismiss the claims against it in the amended complaint, on the grounds that it was not the owner of Jackpot at the time of the incident and therefore cannot be held liable for any of the injuries alleged. In support of its position, Animal Haven cites case law holding owners liable in dog bite cases when the owner knew or should have known of the dog's vicious propensities. Galgano v. Town of N. Hempstead, 41 A.D.3d 536 (2d Dep't 2007) (holding that to recover in tort for a dog bite, "the plaintiff must establish that the dog had vicious propensities and that the owner

¹ By stipulation dated June 1, 2010, the parties stipulated to discontinue the action without prejudice against defendants Lisa Sternlicht and Ben Josh Management Corp.

knew or should have known of the dog's propensities."); see also Collier v. Zambito, 1 N.Y.3d 444, 446 (2004) (restating New York's long-standing rule that "the owner of a domestic animal who either knows or should have known of that animal's vicious propensities will be held liable for the harm the animal causes as a result of those propensities").

Animal Haven also relies on New York City Administrative Code § 17-802², New York City Health Code § 161.02³, and New York Agric. & Mkts. Law § 350⁴ which, Animal Haven asserts, supports its position that an individual, like Skimbirauskas, who adopts a dog from a full-service shelter, is the dog's owner. As proof that it does not own Jackpot, Animal Haven further relies on the Adoption Contract between Animal Haven and Skimbirauskas, which Animal Haven contends establishes that Animal Haven ceased being the owner of Jackpot at the time of his adoption. Animal Haven also argues that even if it could be considered Jackpot's owner, the amended complaint does not adequately plead that Animal Haven knew or should have known that Jackpot had vicious propensities.

Frank counters that, at the very least, the Adoption Contract raises factual questions as to whether Animal Haven remained the owner of Jackpot after his adoption by Skimbirauskas. See Dow v. Beck, 2008 N.Y. Slip Op 32562 (Sup. Ct., Suffolk

² NYC Admin. Code § 17-802 provides: " 'Adoption' means the delivery of a dog or cat deemed appropriate and suitable as a companion animal by an animal shelter to an individual at least eighteen years of age who has been approved to own, care and provide for the animal by the animal shelter."

³ NYC Health Code § 161.02 provides: "Owner means any person who owns, harbors, possesses, adopts, cares for or keeps an animal."

⁴ NY Agric. & Mkts. Law § 350 provides: " 'Adoption' means the delivery to any natural person eighteen years of age or older, for the limited purpose of harboring a pet, of any dog or cat, seized or surrendered. "

County, 2008) (Pitts, J.) (holding that the issue of ownership of an animal by an animal shelter is a factual question that depends on the level of dominion or control over the dog in question). In support of her position, Frank relies on provisions in the Adoption Contract requiring Skimbirauskas to return Jackpot to Animal Haven in the event Skimbirauskas cannot keep his commitment, and prohibiting him from giving Jackpot to any other person. Frank also relies on a provision allowing Animal Haven to investigate whether Jackpot is well cared for, and to remove Jackpot from Skimbirauskas' home should it find that the contract terms are not being met. Frank also notes that there is a microchip in Jackpot's body so Animal Haven can keep track of the dog.

Frank also argues that Animal Haven knew or should have known that Jackpot has "vicious propensities," based on an email exchanged in discovery, dated June 7, 2007, reporting that on June 1, 2007, Jackpot bit a child on the lip while out for a walk in a Manhattan park.

Buchbinder & Warren LLC and 172 East 4th Street Tenants Corp. also oppose Animal Haven's motion to the extent it seeks to dismiss their cross-claims against Animal Haven, asserting that since no discovery has been provided by Animal Haven, it cannot be determined if Animal Haven was negligent in its care and training of Jackpot, or if Animal Haven knew of Jackpot's alleged dangerous propensities and failed to warn Skimbirauskas.

In reply, Animal Haven argues that Frank fails to identify any legal basis for Animal Haven's liability, or to distinguish any precedent cited by Animal Haven in its motion to dismiss or to provide any case law in which a shelter has been held liable for a dog bite after a dog had been adopted.

Discussion

On motion pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true. Guggenheimer v. Ginzburg, 43 N.Y. 2d 268 (1977); Morone v. Morone, 50 N.Y.2d 481 (1980). At the same time, “[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference” Morgenthau & Latham v. Bank of New York Co., Inc., 305 A.D.2d 74, 81 (1st Dept 2003), quoting, Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dept 1999), aff’d, 94 N.Y.2d 659 (2000). In such cases, “the criterion becomes ‘whether the proponent has a cause of action, not whether he has stated one.’” Id., quoting, Guggenheimer, 43 N.Y.2d at 275. However, dismissal based on documentary evidence may result “only where ‘it has been shown that a material fact as claimed by the pleader...is not a fact at all and...no significant dispute exists regarding it.’” Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 76 (1st Dep’t 2001), quoting, Guggenheimer, 43 N.Y.2d at 275.

“Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms.” Beal Sav. Bank v. Sommer, 8 N.Y. 3d 318, 324 (2007); see also Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co., 1 N.Y.S. 470, 475 (2004).

Under the terms of the Adoption Contract, it is clear that Skimbirauskas is the owner of Jackpot since it provides that he has the sole responsibility for the care of

Jackpot and has made a “lifetime commitment to adopt [Jackpot] at [his] own risk.” In addition, under the Adoption Contract, Skimbirauskas acknowledges that Animal Haven cannot guarantee Jackpot’s health or temperament and releases Animal Haven from all liability once Jackpot is in his possession. Moreover, while Animal Haven retains the right to investigate whether Jackpot is well cared-for and to remove Jackpot should it find that the terms of the Adoption Contract are not being met, these measures are designed to ensure the safety of Jackpot and do not make Animal Haven the owner of Jackpot.

The court’s reading of the Adoption Contract is consistent with New York City statutes and regulations providing that an individual who adopts a dog from a full-service animal shelter is the dog’s owner. Specifically, New York City Administrative Code § 17-802(a) provides that an individual who adopts a dog from a full-service animal shelter is approved to “own, care and provide for the [dog].” In addition, New York City Health Code § 161.02 defines an owner of a domesticated animal as anyone who owns, harbors, possesses, adopts, cares for or keeps an animal (emphasis supplied). And, § 161.04(a) requires that anyone who “keeps, harbors, adopts, purchases, or cares for a dog in New York City,” to obtain a license for each dog owned, possessed or controlled, but does not require an animal shelter to obtain a license for any dog kept by such shelter.

Here, Animal Haven did not own, harbor, possess or care for Jackpot at the time of the biting incident and, in fact, Jackpot had been adopted by Skimbirauskas more than two years before the incident. Furthermore, the courts have treated a person adopting a dog from an animal shelter as the dog’s owner. See Bernstein v. Penny-Whistle Toys, Inc., 40 A.D.3d 224, 224-26 (1st Dep’t 2007) (noting that defendant owner adopted the

dog in issue from an animal shelter five years prior to biting incident); see also D.C. ex rel. Christian v. Petco Animal Supplies Stores, Inc., Index No. 1670/06, 16 Misc. 3d 1114(A), 2007 N.Y. Slip Op 51413(U), at *1 (Sup. Ct. Nassau County July 16, 2007), aff'd, 54 A.D.3d 707, 863 N.Y.S.2d 756 (2d Dep't 2008) (describing defendant who adopted a Rottweiler ten days prior to biting incident as "dog owner").

Next, Frank's reliance on Dow v. Beck, 2008 NY Slip Op 32562 (Sup. Ct., Suffolk Cty, 2008), is misplaced. In Dow, the shelter was held to be potentially liable to plaintiff based on evidence that the dog was only temporarily housed with an individual while the shelter tried to find the dog a permanent home. In contrast, here, there was no temporary arrangement between the shelter and the individual housing the dog. Instead, under the Adoption Contract, Skimbirauskas became Jackpot's lifelong guardian more than two years before the incident.

Accordingly, Animal Haven cannot be held liable to Frank for the dog-biting incident, and the court need not reach the issue of whether Animal Haven had notice of Jackpot's vicious propensities.

Finally, since there is no basis for Animal Haven's liability to Frank, the cross-claims of Buchbinder & Warren, LLC and 172 East 4th Street Tenants Corp. against Animal Haven for contribution are dismissed. See Stone v. Williams, 64 NY2d 639, 642 (1984)(court's conclusion that defendant is not liable to plaintiff "necessarily defeats the cross claims for ... contribution asserted against defendant); Smith v. Sapienza, 52 N.Y.2d 82, 87 (1981) (where the plaintiff has no cause of action against defendant, a third party possesses no claim for contribution against the defendant).

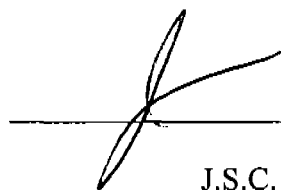
Conclusion

In view of above, it is

ORDERED that Animal Haven's motion to dismiss is granted, and the claims and cross-claims against Animal Haven are dismissed; and it is further

ORDERED that the remaining parties shall appear in Part 11, room 351, 60 Centre Street, New York, NY on March 15, 2012 at 9:30 am for a compliance conference.

DATED: February 2, 2012



J.S.C.

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