

Mandato v Animal Care and Control of N.Y. City, Inc.
2019 NY Slip Op 31171(U)
March 21, 2019
Supreme Court, Richmond County
Docket Number: 152046/17
Judge: Wayne M. Ozzi
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

DCM Part 23

JACLYN MANDATO,

Present:

Hon. Wayne M. Ozzi

Plaintiff,

-against-

DECISION AND ORDER

ANIMAL CARE AND CONTROL OF NEW YORK
CITY, INC., d/b/a ANIMAL CARE & CONTROL OF
NYC, TLC REALTY HOLDINGS, LLC., RICHMOND
VALLEY VETERINARY PRACTICE, P.C. d/b/a
RICHMOND VALLEY VETERINARY PRACTICE,
LISA A. ESPOSITO, TARA PURCELL, JASON L.
SHULL, CHRISTOPHER J. POWELL and JOHN MACCIA,
Defendants.

Index No. 152046/17
Motion Nos. 003
007
008

-----X

The following papers numbered 1 to 10 were marked submitted on the January 10, 2019:

Notice of Motion for Summary Judgment

By Defendant Animal Care and Control of New York City, Inc.,
with Supporting Papers and Exhibits (003)
(dated July 2, 2018) 1

**Affirmation in Support of Plaintiff's Cross-Motion to Amend the
Complaint to Add a Party Defendant and in Opposition to the Motion
Pursuant to CPLR Rule 3212 by Defendant, Animal Care and Control
Of New York City, Inc.,**

By Plaintiff (dated September 6, 2018)..... 2

Affirmation in Further Support

By Defendant Animal Care and Control of New York City, Inc., (003)
(dated September 11, 2018)..... 3

Notice of Motion to Dismiss Second Amended Complaint

By Defendant TLC Realty Holdings, LLC
with Supporting Papers and Exhibits (007)
(dated September 27, 2018)..... 4

Notice of Motion to Dismiss Second Amended Complaint

By Defendant TLC Veterinary P.C., d/b/a Richmond Valley Veterinary Practice
with Supporting Papers and Exhibits (008)
(dated October 18, 2018) 5

Affirmation in Further Support

By Defendant Animal Care & Control of New York City
with Exhibit (003)
(dated December 7, 2018)..... 6

**Affidavit of Merit in Opposition to Motion to Dismiss
by Plaintiff** 7
(dated December 13, 2018)

Affirmation in Opposition
By Plaintiff, with Supporting Papers and Exhibits
(dated December 14, 2018)..... 8

Affirmation in Reply
By Defendant TLC Realty
(dated January 4, 2019) 9

Reply Memorandum of Law
By Defendants
(dated January 9, 2019)..... 10

Upon the foregoing papers, defendant Animal Care and Control of New York City’s motion to dismiss is denied without prejudice (Motion No. 003); defendant TLC Realty Holdings motion to dismiss is denied without prejudice(Motion No. 007); and defendant TLC Veterinary Practice, P.C., d/b/a and Richmond Valley Veterinary Practice’s motion to dismiss is granted,(Motion No. 008) for the reasons set forth below:

FACTS

On November 4, 2015, the plaintiff was allegedly severely bitten on her legs, while in the breakroom of the Richmond Valley Veterinary Practice by a pitbull named Bishop who had been brought to the Veterinary Practice for medical treatment. At the time of the alleged attack, plaintiff was employed by TLC Veterinarians, P.C. as a veterinary assistant.¹

¹ On April 18, 2012, TLC Veterinary Practice, P.C., assumed the name of Richmond Valley Veterinary Practice. (See, Defendant Richmond Valley Veterinary Practice’s Motion to Dismiss [008], Exhibit A).

The veterinary practice is located at 4915 Arthur Kill Road in Staten Island, New York. The premises are owned by TLC Realty. TLC does not have an office or employees, and the principals in TLC Realty are the same principals as those in the veterinary practice (See Exhibit I, Defendant TLC Realty’s Motion to Dismiss).

Plaintiff brings this personal injury action against Animal Care and Control of New York City (ACCNYC), TLC Realty Holdings, LLC, Richmond Valley Veterinary Practice, P.C., the five individual veterinarians who work at Richmond Valley and Emily Volk, D.V.M., who brought the dog to Richmond Valley for treatment

Defendant ACCNYC now moves to dismiss the complaint against it arguing, *inter alia*, that it did not own the dog at the time that the incident occurred, nor did they bring the dog in for medical treatment (Motion No. 003).

Defendant TLC Realty Holdings also move to dismiss the complaint under the theory that plaintiff was a special employee of TLC Realty and that TLC Realty and Richmond Valley are alter egos of each other, thereby restricting plaintiff to Worker’s Compensation benefits (Motion No. 007).

Defendant TLC Veterinary Practice d/b/a/ Richmond Valley Veterinary Practice, et. al. also move to dismiss the complaint, pursuant to Worker’s Compensation §§ 11 and 29(6) (Motion No. 008).

ANIMAL CARE AND CONTROL OF NEW YORK CITY

Animal Care and Control of New York City (ACCNYC) move to dismiss the complaint

against it² arguing there is no cause of action because ACCNYC did not bring the dog, Bishop, to Richmond Valley, nor did it contract with Richmond Valley for medical care or treatment of Bishop. In the complaint, plaintiff alleges that prior to the date of the incident, the dog had been surrendered to ACCNYC by Emily Volk, DVM, and that Dr. Volk had advised ACCNYC that the dog had vicious propensities. Dr. Volk had previously worked for ACCNYC as a veterinarian.

ACCNYC contends that Dr. Volk did not surrender the dog to ACCNYC but instead had adopted the dog from ACCNYC and it was Dr. Volk who brought the dog to Richmond Valley to remove a tumor on his tail. Dr. Volk testified that she brought Bishop to Richmond Valley with the intention of having him fostered or adopted, but did not intend to adopt the dog herself.

A review of the Exhibits attached to ACCNYC’s motion to dismiss, indicate that on October 29, 2015, Emily Volk signed an Adoption Form in which reads in paragraph 10:

“I hereby waive any claims against AC & C, the City of New York, and the NYC Department of Health and Mental Hygiene (together referred to as “AC & C”) and release AC & C from any and all legal liability for any loss, damage, injury or expense as a result of this adoption due to any cause whatsoever (including any and all claims based on negligence...) accepting for myself the full responsibility for any and all such losses, damages, injuries or expenses that may result from the adoption.”

At first blush it would appear that dismissal of the complaint as against ACCNYC is warranted since it was not the not the dog's owner (*see* CPLR 3211[a] [1]; *Leon v. Martinez*, 84 NY2d 83, 88 [1994]; *see also* Administrative Code of City of N.Y. § 17-802[a] [“ ‘Adoption’ means the delivery of a dog ... deemed appropriate and suitable by an animal shelter to an individual ... who has been approved to *own*, care and provide for the animal by

² Although the notice of motion provides that dismissal is sought “pursuant to CPLR §3212, i.e., summary judgment after issue has been joined, the motion will be treated as one pursuant to CPLR §3211 (a)(7), since no answer has been served by this moving defendant.

the animal shelter” (emphasis added). However, Dr. Volk’s deposition testimony on November 12, 2018 contradicts what is stated in the adoption form:

Q: Was it your intention to adopt Bishop?

A: No.

Q: What was your intention to do?

A: To place him with another veterinarian who said she was going to take over rescue for him.

Q: Who was the veterinarian that you were going to give the dog to?

A: Lisa Esposito.

(EBT of Emily Volk, p 11).

Q: Did you discuss the dog’s medical history?

A: Well, he had a mass on his leg, that Dr. Esposito was planning on removing.

Q: And you discussed any payment for the medical care that Bishop was going to be receiving?

A: No, I was not paying for anything.

Q: And when you say you were not paying for anything, can you tell me what you mean by that?

A: I mean that he was no longer my dog and that I was just transporting him. That I had no further plans on interacting with him or being involved.

Q: And was that something that you had discussed with Dr. Esposito prior?

A: Absolutely.

Q: And what had you said to Dr. Esposito?

A: I don’t remember the exact words, but the agreement was that I was just transporting this dog and she was taking over ownership of him and then doing

any medical services needed and then placing him in a home and I wasn't involved in (sic) after the transport."

(EBT Emily Volk, p. 15).

Dr. Volk also stated in the Adoption Form that she was adopting Bishop as a companion for her current dog, Jerry. During her deposition she was asked the following:

"Q: If you were going to bring this dog to Richmond Valley Veterinary Practice, why did you list this as the reason for adopting the dog?"

A: I don't know."

(EBT Emily Volk, p. 38, Adoption Form, p. 3, Plaintiff's Exhibit A).

Moreover, records received as the result of a FOIL request to the New York City Department of Health lists the named owner as Brooklyn Animal Care & Control. In the comment section of the Animal Bite Report it states: "Dog originally came from BK ACC went to Richmond Valley 10/28/15 removal of mass... Richmond Valley agreed to keep Bishop until he was either fostered or adopted out" (See, Plaintiff's Affirmation in Opposition to ACCNYC's motion to dismiss, Exhibit 10).

"To recover upon a theory of strict liability in tort for a dog bite or attack, a plaintiff must prove that the dog had vicious propensities and that the owner of the dog ... knew or should have known of such propensities" (*Palumbo v. Nikirk*, 59 AD3d 691, 691[2d Dept 2009]; see *Petrone v. Fernandez*, 12 NY3d 546, 550 [2009]; *Collier v. Zambito*, 1 NY3d 444, 446 [2009]).

In the instant case, defendant ACCNYC has not presented *prima facie* proof for dismissal as a matter of law, because it is not clear as to who actually had possession of the dog at the time of the incident, since no other parties or witnesses have been deposed in this action other than defendant Emily Volk. Accordingly, defendant ACCNYC's motion to dismiss is denied without prejudice with leave to renew, once discovery has been completed.

It must be remembered that on a motion to dismiss for failure to state a cause of action, which has not been converted to one for summary judgment, the question for determination is whether the plaintiff actually pleaded a cause of action, and dismissal is warranted only if it conclusively established that no cause of action exists (Town of North Hempstead v. Sea Crest Construction Corp., 119 AD 2d 744).

TLC REALTY HOLDINGS, LLC

TLC Holdings Realty, LLC also moves to dismiss under CPLR 3211(a) (5), (7) and CPLR 3212, arguing that plaintiff's only remedy is worker's compensation because she was a special employee of TLC Realty Holdings, who is the alter-ego of Richmond Valley.

Special Employee:

"A person may be deemed to have more than one employer for purposes of the Workers' Compensation Law, a general employer and a special employer" (*Alfonso v. Pacific Classon Realty, LLC*, 101 AD3d 768, 769 [2d Dept 2012], quoting *Slikas v. Cyclone Realty, LLC*, 78 A.D.3d 144 [2d Dept 2010]). "A special employee is 'one who is transferred for a limited time of whatever duration to the service of another,' and limited liability inures to the benefit of both the general and special employer" (*Fung v. Japan Airlines Co., Ltd.*, 9 NY3d 351, 359 [2007] quoting *Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553, 557 [1991]). "[A] person's categorization as a special employee is usually a question of fact" (*Thompson v. Grumman Aerospace Corp.*, 78 NY2d at 557). However, "the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact" (*id.* at 557-558). "Many factors are weighed in deciding whether a special employment relationship exists, and generally no single

one is decisive ... Principal factors include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business ... The most significant factor is who controls and directs the manner, details, and ultimate result of the employee's work" (*Schramm v. Cold Spring Harbor Lab.*, 17 AD3d 661, 662 [2d Dept 2005]; see *Gonzalez v. Woodbourne Arboretum, Inc.*, 100 AD3d 694, 698; [2012]; *Digirolomo v. Goldstein*, 96 AD3d 992, 993–994 [2d Dept 2012]).

In the case at hand, Dr. Powell's affidavit states that he is a one third-owner of TLC Realty and the President of both TLC Realty and TLC Veterinary Practice d/b/a Richmond Valley Veterinary Practice. In addition, he affirms that he controlled plaintiff's work and was "one" of the principals responsible for plaintiff's wages and that plaintiff's tasks included "cleaning of the veterinarian rooms, the waiting area and outside the location." While all of these factors may be indicative of a special employee relationship, there are still issues of fact as to how plaintiff was a "special employee" of TLC Realty, that can only be resolved by further discovery. Accordingly, TLC Realty's motion to dismiss is also denied without prejudice with leave to renew upon further discovery.

Alter Egos:

In instances regarding injuries that occur during the course of a plaintiff's employment, the defense afforded by the exclusivity provisions of the Workers' Compensation Law may also extend to suits brought by a plaintiff against corporations which are the alter egos of, or joint venturers with, the corporation which employs the plaintiff (see *Ortega v. Noxxen Realty Corp.*, 26 AD3d 361 [2d Dept 2006]; *Quizhpe v. Luvin Constr. Corp.*, 103 AD3d 618, 618–619

[2d Dept 2010]; *Samuel v. Fourth Ave. Assoc., LLC*, 75 AD3d 594, 594–595 [2d Dept 2010];
Cappella v. Suresky at Hatfield Lane, LLC, 55 AD3d 522, 522–523 [2d Dept 2008]).

A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, *prima facie*, that it was the alter ego of the plaintiff's employer (see *Quizhpe v. Luvin Constr. Corp.*, 103 AD3d at 619; *Cappella v. Suresky at Hatfield Lane, LLC*, 55 AD3d at 522–523; *Ortega v. Noxxen Realty Corp.*, 26 AD3d at 362). A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity (see *Quizhpe v. Luvin Constr. Corp.*, 103 AD3d at 619; *Samuel v. Fourth Ave. Assoc., LLC*, 75 AD3d at 595).

In the instant case, TLC Realty Holdings is the owner of the property located at 4915 Arthur Kill Road, which is also the address of the veterinary practice. According to the affidavit of Dr. Powell, a principal in the veterinary practice as well as in TLC Realty, TLC Realty was formed as a holding company specifically to own the property. TLC Realty does not have an office or employees and the principals of TLC Realty are the same principals at the animal hospital (Defendant TLC Exhibit I).

While a good start, there are other relevant factors that could determine whether the two corporations are one and the same, including whether the two entities share financial records and tax returns, whether one entity pays the bills for the other, even if those bills are for the benefit of the nonpaying entity, and whether they share the same insurance policy (see e.g. *Quizhpe*, 103 AD3d at 619; *Carty v. East 175th St. Hous. Dev. Fund Corp.*, 83 AD3d 529, 529, [1st Dept. 2011]; *Samuel v. Fourth Ave. Assoc., LLC*, 75 AD3d at 595 [2010]). These factors can only be determined through

further discovery. Therefore, TLC Realty’s motion to dismiss is denied without prejudice with leave to renew.

RICHMOND VALLEY VETERINARY PRACTICE

In general, workers' compensation benefits are the sole and exclusive remedy of an employee against an employer for injuries sustained in the course of employment (see Workers Compensation Law §§ 11, 29[6]; *Weiner v. City of New York*, 19 NY3d 852, 854 [2012]; *Wilson v. A.H. Harris & Sons, Inc.*, 131 AD3d 1050, 1051 [2d Dept 2015]). “[P]rimary jurisdiction with respect to determinations as to the applicability of the Workers' Compensation Law has been vested in the Workers' Compensation Board” (*Botwinick v. Ogden*, 59 NY2d 909, 911 [1983]; see *O'Rourke v. Long*, 41 NY2d 219, 224 [1976]; *Aprile–Sci v. St. Raymond of Penyafort R.C. Church*, 151 AD3d 671, 672 [2d Dept 2017]; *Nunes v. Window Network, LLC*, 54 AD3d 834, 834 [2d Dept 2008]. The issue of whether a plaintiff was acting as an employee of a defendant at the time of the injury is a question of fact to be resolved by the Board (*Owens v. Jea Bus Co., Inc.*, 161AD3d 1188 [2d Dept 2018]. The findings of the Board are final and binding, and a plaintiff may not maintain an action against a defendant from which he or she has accepted workers' compensation benefits by arguing that he or she was employed by a different entity (see *Derosas v. Rosmarins Land Holdings, LLC*, 148 AD3d 988, 989 [2d Dept 2017]; *Maropakis v. Stillwell Materials Corp.*, 38 AD3d 623, 623 [2d Dept 2007].

Here, Richmond Valley has established, *prima facie*, entitlement to judgment as a matter of law, by demonstrating that the Board had determined that the workers' compensation carrier of TLC Veterinary Practice d/b/a Richmond Valley, was liable for the claim and that the plaintiff had received the benefits (see Defendant Richmond Valley, Motion to Dismiss, Exhibit s C, D &

E; *Derosas v. Rosmarins Land Holdings, LLC*, 148 AD3d at 990; *Maropakis v. Stillwell Materials Corp.*, 38 AD3d at 623).

In opposition, plaintiff has failed to raise a triable issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 557, 560 [1980]). Accordingly, defendant TLC Veterinary Practice, LLC d/b/a Richmond Valley Veterinary Practice’s motion to dismiss is granted.

Accordingly, it is

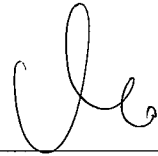
ORDERED that defendant Animal Care and Control of New York City’s motion to dismiss is denied without prejudice with leave to renew once discovery has been completed and it is further;

ORDERED that defendant TLC Realty Holdings, LLC’s motion to dismiss is denied without prejudice with leave to renew upon completion of discovery.

ORDERED that defendant TLC Veterinary Practice, LLC, d/b/a Richmond Valley Veterinary Practices’ motion to dismiss pursuant to Worker’s Compensation §§11 and 29(6) is granted.

The foregoing constitutes the Decision and Order of this Court.

Dated: March 21, 2019



Wayne M. Ozzi, J.S.C.