

McKenzie v Berkovitch
2022 NY Slip Op 30666(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 161890/2018
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA JAMES PART 59

Justice

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ELIZABETH MCKENZIE,

Plaintiff,

- v -

ALEXANDER BERKOVITCH,

Defendant.

-----X

INDEX NO. 161890/2018

MOTION DATE 03/01/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 89

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant to amend the Order dated October 29, 2020 to account for the death of the horses named Romeo and Sassy and for a hearing on the status of the horses named Romeo and Sassy and the dogs named Sammy and Fyodor is DENIED; and it is further

ORDERED that counsel are directed to post on NYSCEF and transmit to SFC-Part59@nycourts.gov a proposed compliance conference order or proposed competing compliance conference order(s) on March 25, 2022; and it is further

ORDERED that counsel are directed to appear via Microsoft Teams for a compliance conference on April 1, 2022, unless such conference is waived by this Court.

DECISION

Without citing any caselaw that supports his position, defendant argues that this Court should apply family law on child custody to this action for replevy of two dogs and two horses. Graves v Stockigt, 79 AD3d 1170, 1171 (3d Dept 2010), the Appellate Division, Third Department, applied a "change of circumstances standard" to a parent's application to change the existing custody order, as follows:

A petitioner seeking to modify an existing custody order must demonstrate a "sufficient change in circumstances reflecting a real need for change in order to insure the continued best interest of the child" (*Matter of Rue v. Carpenter*, 69 A.D.3d 1238, 1239, 893 N.Y.S.2d 696 [2010] [internal quotation marks and citation omitted]; see *Matter of Arieda v. Arieda-Walek*, 74 A.D.3d 1432, 1433, 901 N.Y.S.2d 766 [2010]). Here, for the reasons that follow, and according due deference to Family Court's assessment of witness credibility, we find that a sound and substantial basis in the record exists to support the court's determination that such a change in circumstances occurred to warrant a change in custody (see *Matter of Colwell v. Parks*, 44 A.D.3d 1134, 1135-1136, 843 N.Y.S.2d 711 [2007]).

Though each party speaks of "custody", this court declines to apply family law to the action at bar, which sounds in the replevin of two horses that defendant alleges are named Romeo¹ and Sassy, and

¹In opposition, plaintiff asserts that the horse named Romeo aka Romy died before commencement of the herein action, and therefore is not subject to replevy.

two dogs named Sammy and Fyodor, which though living creatures, are considered personalty under the law. Such animals, for whom each party asserts their affection, care and concern, are without the rights of humans, such as children. The court notes that the Order dated October 20, 2020, which is the subject of the motion at bar, did not award "custody" of the animals to plaintiff, but merely removed any restraint from plaintiff's moving the horses and dogs to Florida, pending the resolution of the herein action.

Nor has defendant met the standard for a motion to renew pursuant to CPLR 2221(e). The new facts, i.e., the death of one of the subject horses and the alleged sickness of one of the dogs, which circumstances arose after the October 29, 2020 Order, do not constitute additional facts that existed at the time that the prior motion was made. See Foley v Roche, 68 AD2d 558, 568 (1st Dept 1979).

Nor has defendant established that he is entitled to the extraordinary provisional remedy that he seeks, which would grant him the ultimate relief on his replevy of personalty counterclaim. See 35 New York City Police Officers v City of New York, 34 AD3d 392, 393-394 (1st Dept 2006). Likewise meritless are the terms of the amendment that defendant seeks, i.e., a direction that the subject personalty be placed in the possession of a person, who is not a party to this action.

To the extent that defendant seeks evidence with respect to the status of the horses, the circumstances surrounding the death of Sassy, and the conditions of dogs named Sammy and Fyodor, the proper vehicle is discovery under CPLR Article 31. This court judicially notices, on its own motion, that counsel have failed to comply with this court's preliminary conference order dated December 3, 2020, which required that they undertake discovery and submit a proposed compliance conference order to this Court on April 12, 2021. With the failure of the parties to meet their discovery obligations, this action has been allowed to languish. Query the extent that defendant is concerned about the welfare of the subject animals, when the procedural process under which he has the right to ascertain evidence in that regard has been eschewed.

Debra A. James
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<u>3/1/2022</u> DATE		<u>DEBRA JAMES, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE