

**Dardaris v Tang**

2022 NY Slip Op 32114(U)

July 6, 2022

Supreme Court, New York County

Docket Number: Index No. 158613/2020

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

*Justice*

-----X

JANIS DARDARIS,

Plaintiff,

- v -

VINCENT TANG,

Defendant.

-----X

INDEX NO. 158613/2020

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26-33, 35-44 were read on this motion to dismiss.

Defendant moves pursuant to CPLR 3211(a)(7) for an order dismissing with prejudice this action, and pursuant to CPLR 325(d) for an order removing the action to civil court for lack of subject matter jurisdiction as the amount in controversy does not exceed \$25,000. Plaintiff opposes.

**I. VERIFIED COMPLAINT (NYSCEF 1)**

Plaintiff left her two Maltese dogs named Frankie and Alex in the care of her dog sitter while she was away on a business trip in the fall of 2019. Only the dog sitter was permitted to enter her apartment to care for the dogs during that time.

On October 24, 2019, defendant, who was the dog sitter's boyfriend, entered plaintiff's apartment and beat Alex to death. He then took Frankie to the roof of plaintiff's building, where he tortured it for several minutes by punching, throwing, chasing, and kicking the dog multiple times. Defendant then brought Frankie back to plaintiff's apartment, where he left him to die. At least some of defendant's actions were witnessed by a resident of a neighboring building, who

alerted plaintiff. Police were called to plaintiff's apartment, where they found Alex dead but Frankie still alive. Frankie survived, but sustained two skull fractures, two fractured ribs, and a permanently damaged left eye.

Plaintiff asserts causes of action for intentional infliction of emotional distress, trespass, trespass to chattels, and punitive damages.

## II. MOTION TO DISMISS

“A party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that . . . the pleading fails to state a cause of action . . .” (CPLR 3211[a][7]). When evaluating such a motion, the court must determine whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Thus, “the court must accept the facts as alleged in the complaint as true, according plaintiffs the benefit of every possible favorable inference . . .” (*JFK Holding Co., LLC v City of New York*, 68 AD3d 477 [1st Dept 2009] [internal quotation omitted]), although “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss.” (*Barnes v Hodge*, 118 AD3d 633 [1st Dept 2014]; *see also Jones v Voskresenskaya*, 125 AD3d 532, 534 [1st Dept 2015] [allegations that are “vague, speculative and unsupported by any facts” cannot sustain cause of action]).

On such a motion, the reviewing court is also required to “determine only whether the acts as alleged fit within any cognizable legal theory” and “the [motion] must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it.” (*Butler v Magnet Sports & Entm't Lounge, Inc.*, 135 AD3d 680, 680-81 [2d Dept 2016]).

A. Intentional infliction of emotional distress

Defendant contends that that, as plaintiff does not allege that she witnessed the injuries to her dogs, and as she was not in the zone of danger, she is not entitled to damages for the intentional infliction of emotional distress and that as the alleged injuries were inflicted on personal property, she cannot recover damages for her mental distress. (NYSCEF 28).

In opposition, plaintiff contends that she properly pleads the elements of intentional infliction of emotional distress, arguing that the zone of danger rule cited by defendant applies only to the negligent infliction of emotional distress, that she need not establish that defendant caused injury to a family member, only that he committed intentional and outrageous acts, and that the destruction of animals and property has been found to be sufficient basis to sustain a cause of action for the intentional infliction of emotional distress. (NYSCEF 37).

In reply, defendant argues that destruction of a family pet cannot sustain a cause of action for the intentional infliction of emotional distress absent a deliberate, systematic and malicious campaign of harassment, intimidation, humiliation and abuse, which plaintiff does not allege. (NYSCEF 41).

A cause of action for intentional infliction of emotional distress requires proof of the following elements: (1) extreme and outrageous conduct, (2) intent to cause or disregard of a substantial probability of causing severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) resulting severe emotional distress. (*Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010]).

The high standard that must be met to demonstrate extreme and outrageous conduct is conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.” (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016], quoting *Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]). It is “designed to filter out petty complaints and assure that the emotional distress is genuine.” (*Chanko*, 27 NY3d at 57 [internal citations omitted]).

Here, defendant fails to demonstrate that his conduct in torturing two small pet dogs and eventually killing one and permanently maiming the other is not extreme, outrageous, atrocious, wanton, wicked, and beyond all possible bounds of decency. (*Barrish v Chiesa*, 182 AD3d 496 [1st Dept 2020] [defendant’s motion to dismiss claim for intentional infliction of emotional distress properly denied where he failed to demonstrate that torturing and killing plaintiff’s cat was not extreme or outrageous conduct]). Additionally, damages may be awarded for emotional distress arising from the intentional destruction of property, including pets. (*Id.*, citing *Weisman v Weisman*, 108 AD2d 853 [2d Dept 1985]). As it is undisputed that plaintiff sufficiently pleads the remaining elements, she states a claim for intentional infliction of emotional distress.

#### B. Trespass and trespass to chattels

Defendant contends that as plaintiff fails to allege that he interfered with her possessory interest with respect to her apartment, she fails to maintain a cause of action for trespass. Additionally, he argues that as plaintiff asserts only loss of companionship of her dogs rather than monetary loss, her cause of action for trespass to chattels must also be dismissed. (NYSCEF 28).

In opposition, plaintiff argues that having pleaded that defendant intentionally entered onto her property without justification or permission, she states a cause of action for trespass, and having also pleaded that defendant acted with malice, punitive damages are available.

Moreover, she denies a need to allege monetary damages to maintain her claim for trespass to chattels. (NYSCEF 37).

In reply, defendant argues plaintiff is not entitled to punitive damages based on trespass for destruction of personal property alone, absent any allegation of destruction or interference with her real property. He otherwise reiterates his arguments. (NYSCEF 41).

“[T]he elements of a trespass cause of action are an intentional entry onto the land of another without permission.” (*Ivory v International Business Machines Corp.*, 116 AD3d 121 [3d Dept 2021], citing *Phillips v Sun Oil Co.*, 307 NY 328 [1954]). A party may recover punitive damages for trespass on real property by proving that the trespasser acted with actual malice involving intentional wrongdoing, or that such conduct amounted to a wanton, willful, or reckless disregard of the party’s right of possession (*Cassata v New York New England Exchange*, 304 AD2d 371 [1st Dept 2003]; *Ligo v Gerould*, 244 AD2d 852, 853 [4th Dept 1997]).

Here, it is undisputed that plaintiff alleges that defendant intentionally entered her property without her permission, and that he acted with malice. Whether plaintiff suffered injury to her possessory interest in real property has no bearing on her trespass claim (*Hill v Raziano*, 63 AD3d 682 [2d Dept 2009] [nominal damages presumed from trespass even where property owner suffered no actual injury to his possessory interest]; *Shiffman v Empire Blue Cross Blue Shield*, 256 AD2d 131 [1st Dept 1998] [nominal damage presumed from trespass]) or on her claim for punitive damages (*see eg Ligo*, 244 AD2d at 853 [plaintiffs entitled to punitive damages for trespass where defendant dumped compost on their porch and boathouse roof]; *Jones v Maples*, 1999 WL 1427659, \*3 [Sup Ct, New York County 1999] [punitive damages

available for trespass claim where defendant broke into plaintiff's apartment and stole her personal property]).

For a cause of action for trespass to chattels, plaintiff is required to establish that defendant "intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [plaintiff's] possession" (*Jackie's Enterprises, Inc. v Belleville*, 165 AD3d 1567 [3d Dept 2018], quoting NY PJI 3:9). "Liability for trespass to chattels will be imposed only if the interference results in harm to the physical condition, quality or value of the chattel or if the owner is deprived of use of the chattel for a substantial time." (*Jackie's Enterprises*, 165 AD3d at 1572).

As pets are still treated under New York law as personal property (*Schrage v Hatzlacha Cab Corp.*, 13 AD3d 150 [1st Dept 2004]), and as plaintiff alleges that defendant intentionally and physically interfered with her pets in a way that deprived her of their use, she states a cause of action for trespass to chattels, and while a pet owner may not recover for loss of companionship of a pet due to negligence (*id.*; *Dejoy v Niagra Mohawk Power Corp.*, 13 AD3d 1108 [4th Dept 2004] [defining loss of companionship as legally equivalent to emotional distress]), such damages are available when caused by defendant's intentional acts (*Barrish*, 182 AD3d at 496).

### III. REMOVAL TO CIVIL COURT

Defendant contends that plaintiff is only entitled to recover damages for Alex's value at the time of its death, plus the reasonable and necessary costs of Frankie's medical treatment, and as plaintiff fails to demonstrate that this amount would exceed the \$25,000 jurisdictional threshold of the supreme court, the matter should be removed to civil court. (NYSCEF 28).

In opposition, plaintiff contends that as she may recover punitive damages on each of her claims, which will likely be in excess of \$25,0000, removal is inappropriate. (NYSCEF 37).

In opposition, defendant reiterates his arguments. (NYSCEF 41).

While the court has discretion to remove an action to a lower court pursuant to CPLR 325(d) without the parties' consent "where it appears that the amount of damages sustained may be less than demanded," removal is inappropriate here given the availability of punitive damages.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss and to remove the action to civil court is denied; and it is further

ORDERED, that defendant file an answer responding to plaintiff's complaint within 30 days of the date of this order.

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BARBARA JAFFE, J.S.C.

7/6/2022  
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE