

**McCurrie v City of New York**

2023 NY Slip Op 32398(U)

July 14, 2023

Supreme Court, New York County

Docket Number: Index No. 150453/2022

Judge: Leslie A. Stroth

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
DENISE McCURRIE,

Plaintiff,

Index No. 150453/2022  
[Mot. Seq. No. 002]

-against-

CITY OF NEW YORK,  
NEW YORK CITY ANIMAL CARE  
CENTER, a/k/a NEW YORK CITY  
ANIMAL CARE AND CONTROL,  
XYZ RESCUE ORGANIZATION,  
Name being fictitious as true name  
unknown, and JANE DOE, name  
being fictitious as true name unknown,

Defendants.

DECISION + ORDER  
ON MOTION

-----X  
HON. LESLIE A. STROTH:

Defendant New York City Animal Care Center, a/k/a New York City Animal Care and Control (hereinafter "ACC") is an animal shelter serving the City of New York. This action involves the alleged improper transfer of plaintiff's dog Roscoe from ACC to an animal rescue organization sued herein as "XYZ Rescue Organization" (hereinafter "XYZ"), through which Roscoe was then adopted out to an individual sued herein as "Jane Doe."

According to plaintiff, on April 16, 2021, she experienced a medical emergency requiring her to be taken by ambulance from her Bronx apartment to a hospital. Two NYPD officers from the 42<sup>nd</sup> Precinct were present at plaintiff's apartment during the emergency. Plaintiff alleges that she made them aware that Roscoe was her emotional support animal. The officers told plaintiff they would take care of Roscoe by bringing him to a veterinary office.

On or about April 19, 2021, plaintiff contacted the 42<sup>nd</sup> Precinct to inquire about Roscoe. She was told that the police gave the dog to ACC. Plaintiff then contacted ACC and was ultimately informed that ACC had given Roscoe to XYZ. ACC refused to provide the name of XYZ to

plaintiff. Subsequently, the individual sued herein as “Jane Doe” applied for and adopted Roscoe from XYZ. Plaintiff tried to recover the animal to no avail.

### PROCEDURAL HISTORY

Upon obtaining counsel, plaintiff commenced this action against ACC, the City of New York (hereinafter “the City”), XYZ, and “Jane Doe,” by filing a summons and verified complaint (hereinafter “the initial pleadings”) on January 14, 2022, seeking to recover possession of Roscoe, or in the alternative, to be immediately provided with information about Roscoe’s location (NYSCEF Doc. No. 1). The initial pleadings indicate that plaintiff is represented by attorney Joseph W. Murray and are verified by Murray. On January 21, 2022, plaintiff filed a second summons and an “amended verified complaint” (hereinafter “the second complaint”) which are identical to the initial pleadings, except for being verified by attorney Nora Constance Marino, and indicating that plaintiff is represented by both Murray and Marino (NYSCEF Doc. Nos. 2-3).

On March 1, 2022, plaintiff moved to compel ACC to disclose the name of XYZ. By order, dated March 10, 2022, this court directed ACC to disclose the information (NYSCEF Doc. No. 30). Thereafter, ACC identified the organization as “Social Tees” (NYSCEF Doc. No. 33).

In the interim, on or about March 9, 2022, the City filed an answer. The City also filed cross-claims against ACC for contribution and indemnification (NYSCEF Doc. No. 29).

Now, by notice of motion dated March 18, 2022, ACC moves, pre-answer, to dismiss the second complaint insofar as asserted against it pursuant to CPLR 3211 (NYSCEF Doc. No. 35). The City opposes ACC’s motion and requests that in the event ACC’s motion is granted, that the City’s cross-claims against ACC be converted to a third-party action (NYSCEF Doc. No. 81).

Plaintiff also opposes ACC’s motion and cross-moves, by notice of cross-motion dated April 7, 2022, for leave to amend the second complaint to (1) substitute Social Tees for XYZ, (2)

correct the caption to properly name ACC as “Animal Care Center of NYC” in that ACC has since informed the court that this is its correct name, (3) add ACC’s President and Chief Executive Officer Risa Weinstock as a defendant, and (4) add causes of action sounding in negligence, respondeat superior, illegal seizure, deprivation of due process, conversion, breach of contract, intentional and negligent infliction of emotional distress, and violations of the Americans with Disabilities Act, the New York State Human Rights Law, the New York State Civil Rights Law, and the New York City Human Rights Law (NYSCEF Doc. Nos. 59, 74). ACC opposes plaintiff’s cross-motion.

In her reply papers, plaintiff asserts that she made some typographical errors and inadvertently omitted “JOHN DOES 1-10 (employees of ACC whose full names and identifies are currently unknown)” as defendants in the proposed amended complaint she annexed to her cross-motion papers. She attaches to her reply papers a copy of a proposed amended complaint reflecting these changes (NYSCEF Doc. No. 88). ACC takes issue with these changes, arguing that it is improper to include a request for relief for the first time in one’s reply papers (NYSCEF Doc. No. 91).

For the reasons that follow, ACC’s motion is denied as academic, and plaintiff’s cross-motion is denied as unnecessary.

#### **PLAINTIFF’S CROSS MOTION TO AMEND**

For purposes of judicial economy, the Court first review’s plaintiff’s cross-motion to amend. Pursuant to CPLR 3025 (a), “[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.” CPLR 1003 provides that “[p]arties may be added at any stage of the action . . . once without leave of court within twenty days after service

of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it.”

After a party amends the original pleading once as of right, or the period for doing so without leave has expired, a party may still amend his or her pleading by leave of court pursuant to CPLR 3025 (b) and may include additional parties at any time by leave of court pursuant to CPLR 1003. Whether to grant leave involves an examination of whether there would be prejudice or surprise resulting from the proposed amendment and, in the absence of prejudice, whether the proposed amendment “is palpably insufficient or patently devoid of merit” (*Favourite Ltd. v Cico*, 208 AD3d 99, 108 [1st Dept 2022]).

Here, in the second complaint, plaintiff made a correction to the name of the attorney verifying the initial complaint. The second complaint was otherwise identical to the initial complaint. In support of her cross-motion, plaintiff asserts that she did not need to file an “amended” complaint pursuant to CPLR 3025 (a) in order to correct the error in the verification because the court had the discretion to allow a defect in verification to be corrected or ignored. Thus, she asks the court to treat this as her first amendment as of course, despite the fact that she characterized the second complaint as “amended.”

CPLR 3026 provides: “Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced.” CPLR 2001 also permits a “mistake, omission, defect or irregularity” to be disregarded where a substantial right of a party is not prejudiced. There is support for the proposition that a court may ignore a defect in the form of a verification, or lack thereof, in the absence of a showing of a prejudice of a substantial right (*see Duerr v 1435 Tenants Corp.*, 309 AD2d 607, 607 [1st Dept 2003][“since plaintiff does not claim that she was prejudiced by the submission of the defective verification, the defect should be ignored”]; *Matter of Smith v*

*Board of Stds. & Appeals of City of N.Y.*, 2 AD2d 67, 70 [1st Dept 1956]; *State of New York v McMahon*, 78 Misc 2d 388, 389 [Sup Ct, Albany County 1974][“Verification is part of a pleading and is, therefore, just as subject to CPLR 3026 as any other part”]; Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3022:2)).

In urging the court to treat the second complaint as her initial complaint for the purposes of CPLR 3025 (a), plaintiff relies on *Grand White Realty Corp. v Berman* (110 AD2d 582 [1st Dept 1985]). In that case, one of the defendants, Berman, moved to dismiss the complaint on the ground that service had not properly been effected upon him. Supreme Court granted the motion to the extent of ordering a hearing and referring the hearing to a Special Referee who concluded that service had not been properly effected and recommended that Berman’s motion to dismiss be granted. The court then confirmed the Special Referee’s report and directed that an order dismissing the complaint against Berman be entered. The plaintiff then served an “amended summons and complaint” on Berman, who moved to dismiss it, arguing, inter alia, that under CPLR 3025, service of the amended complaint required permission of the court. Supreme Court granted the motion, dismissing the amended complaint insofar as asserted against Berman. On appeal, the First Department reversed, stating as is relevant here that the Supreme Court:

“in striking the complaint, exalted form over substance. The reference to the second complaint as an amended complaint was plainly a misnomer. The so-called amended complaint was a mirror image of the initial complaint as against defendant Berman. By the time of its service, the separate causes as against [the other defendant] had been discontinued with prejudice. Thus, as to Berman the ‘amended’ complaint did not supersede the initial complaint. That had been dismissed as against Berman because service had been defective. As a result, it was as if no service had been made...” (*id.* at 582-583).

*Grand White Realty Corp.* is not precisely on point here because the original complaint in that case was never served on Berman. Therefore, the “amended” pleading never actually superseded the original pleading with respect to Berman. Here, plaintiff served both the original complaint and the second complaint. Therefore, the second complaint technically superseded the

original. That said, the original complaint and the second complaint, as in *Grand White Realty Corp.*, are mirror images of one another, despite the second complaint's characterization as "amended." The only difference being a correction to the verification signature line. Under such circumstances, the court finds that treating plaintiff's second complaint as an "amended" complaint for the purposes of CPLR 3025 (a) would exalt form over substance.

The court further notes that the time within which to file an amended complaint in this action without leave of court has not expired. "Since a motion to dismiss extends the defendant's time to answer the complaint 'until ten days after service of notice of entry of the order' deciding the motion (CPLR 3211 [f]), and since the court had not yet . . . decided defendant's CPLR 3211 motion at the time plaintiff [cross-moved] to amend [her] complaint, plaintiff [does] not need to move pursuant to CPLR 3025(b); instead, [she can amend] as of right pursuant to CPLR 3025 (a)" (*Roam Capital v Asia Alternatives Mgt. LLC*, 194 AD3d 585, 585-586 [1st Dept 2021]). Also, whereas here, there are multiple defendants, "some of whom have answered and some of whom have moved to dismiss, . . . the time to amend as of right has not expired while the outstanding motions to dismiss are still pending" (*AGA Ad Media, LLP v Moskowitz*, 2016 NY Slip Op 31661 [U], \*\*3 [Sup Ct, NY County 2016, Rakower, J.]; see also *Citibank (N.Y. State), N.A. v Suthers*, 68 AD2d 790, 794-795 [4th Dept 1979]).

As to the addition of parties, the CPLR provides that "[p]arties may be added at any stage of the action . . . once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires *or within twenty days after service of a pleading responding to it*" (CPLR 1003 [emphasis added]). Where there are multiple defendants in an action, the 20 days runs from the date that the last answer is served (see *AGA Ad Media, LLP v Moskowitz*, 2016 NY Slip Op 31661 [U], \*\*3; *KPG Inc. v Salinas Group Ltd*, 2003

WL 25668184 [Sup Ct, NY County 2003, Heitler, J.], *affd on other grounds* 11 AD3d 338 [1st Dept 2004]; *Dynaire Corp. v Germano*, NYLJ, Aug. 1, 1996, at 24, col I [Sup Ct, NY County, Friedman, J.]; Siegel, *New York Practice* § 65, at 123 [6th ed]). As such, leave of court is not required under the circumstances of this case.

Given that leave is not required, plaintiff's cross-motion is denied as unnecessary and the proposed amended pleading in the form annexed to her reply papers (NYSCEF Doc. No. 89) shall be deemed served upon service of a copy of this order with notice of its entry upon defendants.

#### **ACC'S MOTION TO DISMISS**

As the Court allows plaintiff's amended pleading as a matter of course, ACC's motion to dismiss is denied as academic. The motion is denied without prejudice for ACC to file a renewed motion to dismiss in response to plaintiff's amended pleading, which asserts numerous additional theories of recovery and includes new defendants.

#### **CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that plaintiff's cross-motion for leave to amend is denied as unnecessary given that plaintiff was entitled to serve the proposed amended pleading as of right; and it is further

**ORDERED** that the proposed amended complaint in the form annexed to plaintiff's reply papers (NYSCEF Doc. No. 89) shall be deemed served upon service of a copy of this order with notice of its entry upon defendants;<sup>1</sup> and it is further

**ORDERED** that defendants shall answer the amended pleading or otherwise respond thereto within 20 days from the date of such service; and it is further

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<sup>1</sup> The Court does not review the merit of the proposed amended complaint, as it is amended as of course.

ORDERED that defendant New York City Animal Care Center, a/k/a New York City Animal Care and Control's motion to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 is denied as academic.

This constitutes the decision and order of the Court.

7/14/2023

DATE

  
HON. LESLIE A. STROTH

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE