

Anzalone v Marino
2024 NY Slip Op 35654(U)
November 12, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 611841/2024
Judge: George Nolan
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Short Form Order

Index No. 611841/2024

SUPREME COURT – STATE OF NEW YORK
PART 55 – SUFFOLK COUNTY**P R E S E N T:****Hon. George Nolan**
Justice Supreme Court-----x
STEPHEN ANZALONE,

Plaintiff,

-against-

JENNIFER MARINO, and
NORTH SHORE VETERINARY HOSPITAL, LLC,Defendants.
-----xMot. Seq. No. 001 – MD
Orig. Return Date: 08/26/2024
Mot. Submit Date: 09/26/2024Mot. Seq. No. 002 – MD
Orig. Return Date: 08/29/2024
Mot. Submit Date: 09/26/2024**PLAINTIFF'S ATTORNEY**
MARK L. DEBENEDITTIS, ESQ.
99 Smithtown Boulevard
Smithtown, New York 11787**DEFENDANTS' ATTORNEYS**
LAW OFFICES OF MICHAEL J.
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Mineola, New York 11501CONNICK MCNAMEE PLLC
*Counsel for North Shore Veterinary
Hospital, LLC*
1225 Franklin Avenue, Suite 510
Garden City, New York 11530

Upon the e-filed documents numbered 07 through 17, and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

ORDERED that the following motions are consolidated solely for purposes of this decision and order and, as so consolidated, are determined as set forth hereinafter; and it is further

ORDERED that the motion of defendant Jennifer Marino for an order pursuant to CPLR 3211(a)(1) and (a)(7) dismissing plaintiff's complaint (motion sequence no. 001) is denied; and it is further

ORDERED that the motion of defendant North Shore Veterinary Hospital LLC for an order pursuant to CPLR 3211(a)(7) and (a)(1) dismissing plaintiff's complaint (motion sequence no. 002) is denied.

Plaintiff Stephen Anzalone commenced this action by filing a summons and complaint on May 13, 2024. In his complaint, plaintiff makes a claim of conversion against defendant Jennifer Marino ("Marino") and a breach of contract claim against defendant North Shore Veterinary Hospital, LLC ("North Shore"). North Shore filed an answer with discovery demands on July 18, 2024.

According to the complaint, plaintiff owned a Pitbull dog named "Daisy" that he boarded at defendant North Shore's facility located at 835 Fort Salonga Road, Northport New York on March 3, 2024. On March 8, 2024, allegedly without plaintiff's knowledge and consent, North Shore released "Daisy" to defendant Marino. Plaintiff claims that Marino refused to return the dog to him.

In lieu of answering, Marino moves for an order dismissing plaintiff's complaint pursuant to CPLR 3211 based on documentary evidence, and failure to state a cause of action. Similarly, North Shore moves pursuant to CPLR 3211 to dismiss plaintiff's complaint for failure to state a cause of action and based on documentary evidence.

In support of her motion, Marino submits an attorney affirmation, the complaint, copies of text messages purportedly between the parties regarding "Daisy," and the defendant's affirmation dated July 22, 2024. The motion is unopposed.

In determining a pre-answer motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "the standard is whether the pleading states a cause of action" (*Sokol v. Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). "When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true, and provide plaintiffs with the benefit of every favorable inference" (*see Sunyoung Jung v. Reiner & Kaiser Assoc.*, 220 AD3d 643, 198 NYS3d 106 [2d Dept 2023]). Whether a plaintiff can ultimately prevail is irrelevant (*Cortlandt St. Recovery Corp. v. Bonderman*, 31 NY3d 30, 73 NYS3d 95 [2018]; *Grabowski v. Orange County*, 219 AD3d 1314, 196 NYS3d 113 [2d Dept 2023]). "Although inartfully pleaded, a claim should not be dismissed when the facts stated are sufficient to make out a cause of action" (*Houtenbos v. Fordune Assn., Inc.*, 200 AD3d 662, 160 NYS3d 57 [2d Dept 2021]).

CPLR 3211 (a) (1) allows a defendant to seek dismissal of the complaint when "a defense is founded upon documentary evidence." Dismissal on this ground "is warranted only if the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Krasnow v. Catania*, 219 AD3d 1324, 197 NYS3d 70 [2d Dept 2023]). Evidence submitted must be "unambiguous, authentic, and undeniable" (*Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 913 NYS2d 668 [2d Dept 2010]). Affidavits, deposition testimony, and letters do not constitute documentary evidence (*Davis v. Henry*, 212 AD3d 597, 181 NYS3d 606 [2d Dept 2023]), as they can be challenged by other evidence (*Russo v. Crisona*, 219 AD3d 920, 195 NYS3d 729 [2d Dept 2023]). Instead, "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the

contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” (see *Varricchio v. Big Bros. Big Sisters of Am., Inc.*, 220 AD3d 905, 199 NYS3d 107 [2d Dept 2023]).

Reliance upon text messages between the parties is not the kind of documentary evidence contemplated by CPLR 3211(a)(1). “To be considered documentary, evidence must be unambiguous and of undisputed authenticity, that is, it must be essentially unassailable” (*Bath & Twenty, LLC v. Federal Sav. Bank*, 198 AD3d 855, 156 NYS3d 316 [2d Dept 2021]). Excerpts from text messages “do not meet the requirements for documentary evidence” necessary to support a motion pursuant to CPLR 3211(a)(1) (*MJ Lilly Assoc., LLC v. Ovis Creative, LLC*, 221 AD3d 805, 200 NYS3d 403 [2d Dept 2023]). Finally, the text messages do not “conclusively establish a defense as a matter of law” (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 746 NYS2d 858 [2002]).

Here, the plaintiff’s complaint adequately pleads a cause of action of conversion against Marino and Marino has failed to submit evidence that establishes a defense as a matter of law.

Turning next to defendant North Shore’s motion, in support of its motion to dismiss, North Shore submits the pleadings, an attorney affirmation and the affirmation of Dr. Russell W. Fredericks dated August 9, 2024. The motion is unopposed.

In essence, North Shore argues that it does not board animals and only offers care and treatment to animals and that plaintiff’s dog “Daisy” was not boarded nor seen as a patient between March 3, 2024, through March 8, 2024.

In as much as the only documentary evidence submitted by North Shore is an affidavit, this is insufficient to support a motion to dismiss pursuant to CPLR 3211(a)(1) (*Eisner v. Cusumano Const., Inc.*, 132 AD3d 940, 18 NYS3d 683 [2d Dept 2015]). Further, the court finds that plaintiff has adequately plead a breach of contract claim against defendant North Shore.

For the reasons outlined above, the motions are denied.

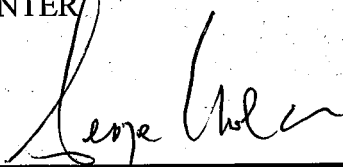
In accordance with CPLR 3211(f), defendant Marino is directed to file and serve a verified answer herein within 20 days after service of notice of entry of this order.

The parties are directed to complete and upload to NYSCEF a preliminary conference order on or before January 7, 2025.

The foregoing constitutes the decision and Order of the Court.

DATE: November 12, 2024
Riverhead, NY

ENTER/



HON. GEORGE NOLAN, J.S.C.

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION