

DOCKET NO. FST-CV 19-5021239-S : SUPERIOR COURT
ANIMALS R FAMILY, INC. : JUDICIAL DISTRICT OF
STAMFORD-NORWALK
v. : AT STAMFORD
SUNRISE ASSISTED LIVING OF :
STAMFORD AND MARIE MALWITZ : JUNE 20, 2019

PLAINTIFF'S POST PREJUDGMENT REMEDY HEARING BRIEF

I. Introduction

The continuing care and lifetime condition of the dog Happy is what this matter is all about, and it is the overwhelming basis for plaintiff commencing the prejudgment remedy proceeding and the underlying action of replevin. This has been plaintiff's focus since it learned of Happy's situation. Many terms of the agreement at issue in this proceeding expressly benefit not the parties, but the dog Happy for his continuing care. Because both defendants failed to provide proper care of Happy, plaintiff was foremost obligated to exercise its rights under the agreement to re-possess him in order to provide him with that care. Plaintiff testified it never sought to re-possess Happy for any reason other than to fulfill its obligation to him, obligations which are clearly stated in the agreement at issue.

While the condition of this property, Happy, may not be determinative and particularly applicable in a replevin action, both parties to the agreement at issue had an ongoing obligation to the dog. Sunrise violated the express terms of the agreement when it transferred Happy to defendant Malwitz and when it failed to continue providing Happy proper care. Based on these breaches and on defendant Malwitz' continuing failures to comply with plaintiff's offers for her to seek veterinary care for Happy and to properly adopt him, even at no cost to Malwitz, plaintiff had no option but to exercise its rights under the agreement and demand re-possession of him. Plaintiff had a moral obligation and a legal right to re-possess Happy.

II. Facts

Evidence at the hearing established defendant Sunrise Assisted Living of Stamford (Sunrise) and the plaintiff entered into an agreement in 2012 for the adoption of Happy to permanently reside under the care of Sunrise at its facility, unless certain conditions were not met and maintained. Several terms of the agreement require Sunrise to provide proper care of Happy throughout his lifetime, and several express statements in the agreement declare plaintiff has made a commitment to Happy to provide him with lifetime care. In furtherance of these obligations, the agreement also expressly prohibited Sunrise from transferring permanent custody, ownership or

possession of Happy to anyone without the prior approval and written consent of plaintiff. The agreement also provides if Happy is not provided with proper care or is transferred to another without complying with the conditions for transfer, Sunrise not only has a duty to return Happy to plaintiff, but more importantly, plaintiff has the right to re-possess him, in large part to fulfill its own expressed obligations to care for him.

In 2016, Sunrise agreed with the permanent removal of Happy from its facility to the home of defendant Malwitz, without notifying plaintiff nor complying with any of the terms of the agreement for this transfer to occur. Sunrise also ceased caring for Happy shortly thereafter. Plaintiff learned of this in December, 2018, and learned that Happy's physical condition had become severely compromised. It then offered to allow Malwitz to adopt Happy if she would take Happy to plaintiff's veterinarian to be medically evaluated and treated, and if she would complete plaintiff's adoption application and requirements. Over the following six months, Malwitz repeatedly refused to do so, even after plaintiff commenced the instant action and sought a court order for Happy's medical attention and treatment.

When Sunrise first learned of plaintiff's concerns, Malwitz was still employed by Sunrise. At first, Sunrise demanded Malwitz return Happy to them, but she refused. Malwitz testified she told Sunrise she was keeping Happy and terminated her

employment. When these attempts to have Happy returned to plaintiff failed, plaintiff brought the instant action.

III. Plaintiff established probable cause it has a superior property interest and right to immediate possession in Happy, who is being wrongfully detained from it.

Plaintiff commenced this statutory action of replevin pursuant to C.G.S. §52-515 to recover the property Happy, which requires plaintiff to have, at the commencement of the action, a superior property interest in Happy as to both defendants and have a right to the immediate possession of him. Happy must also be wrongfully detained from plaintiff. The action was commenced with a prejudgment remedy proceeding, and pursuant to C.G.S. §52-278d(a), plaintiff only has the burden at this stage of the proceeding of proving “whether or not there is probable cause that a judgment in the amount of the prejudgment remedy sought, or in an amount greater than the amount of the prejudgment remedy sought, taking into account any defenses, counterclaims or set-offs, will be rendered in the matter in favor of the plaintiff.”

Plaintiff has a superior property interest to Sunrise because Sunrise is in default of the agreement by transferring Happy to Malwitz without receiving plaintiff’s prior review and approval, and by being unwilling and not providing proper care of Happy at least since 2016. The agreement specifically gives plaintiff the right to immediately re-

possess the dog upon Sunrise's breach of the agreement, which was undisputed at the hearing.

Additionally, plaintiff has a superior property interest to Malwitz because she has no property interest whatsoever in the dog. Malwitz could only have the property interest she acquired from Sunrise if she had been acting as Sunrise's agent when she took Happy. At that time, Sunrise's property interest ceased because transferring Happy to Malwitz was a breach of the restrictive covenants against transfer and care in the agreement, thus giving plaintiff the superior interest and immediate right to possession. Malwitz also ceased to be an agent of Sunrise when she terminated her employment and refused to return Happy to Sunrise, an act analogous to stealing the dog, which clearly provides Malwitz with no property interest as well. Because the agreement bars the transfer of Happy as it occurred, Malwitz has no property interest in the dog and no right to possess him, and Malwitz is therefore wrongfully holding Happy from plaintiff.

IV. Court question #1: What did Plaintiff Transfer?

Plaintiff transferred conditional title and ownership of Happy subject to plaintiff retaining a security interest securing the right to re-possess Happy should certain conditions occur. The security interest arose pursuant to the terms of the agreement and was for the sole benefit of Happy. The right to re-possess the animal is a common

provision in animal adoption agreements utilized by animal rescue organizations, but the issue arises of whether it is legally justifiable. Parties' freedom to contract, or the ability to agree to whatever contract terms they devise absent government or otherwise legal interference and restrictions, afforded the parties in this domestic animal adoption agreement the right to establish binding provisions concerning the re-possession of Happy. These provisions were established for the sole benefit of Happy, who pursuant to the terms of the agreement and the animal abuse and cruelty laws, has a right to proper care.

V. Question #2: If Sunrise breached the agreement by "retiring" Happy to Malwitz, who therefore possessed Happy wrongfully, can Malwitz have any claim to title or possession superior to plaintiff?

Based upon the testimony of defendant Malwitz regarding the letter she wrote to Sunrise and the circumstances surrounding this, it is clear Sunrise never transferred title, but merely transferred possession to her. Malwitz testified Sunrise demanded she return Happy to them. She did not respond to them by stating that Sunrise gave her Happy and she therefore owned him. She testified that she told them she was quitting her job instead and would not return Happy. When this occurred, plaintiff had already revoked the conditional title Sunrise had in Happy, and therefore Sunrise had no title to give Malwitz and no right to possession. Because of the foregoing, Malwitz had no title

or right to possession, but only had actual possession of Happy. Additionally, the response of Sunrise to plaintiff's initial demand for Happy was not that they no longer owned Happy, or that they weren't in breach of the agreement, but rather was to demand that Malwitz return Happy to them.

The terms and breach of the agreement, and the actions of both defendants, provide no basis for Malwitz to have any claim to either title or possession superior to that of plaintiff.

VI. Question #3: If Malwitz cannot acquire a superior claim of title or possession, is the nature of the care she provided relevant to replevin?

The level or degree of care is not relevant to the right of replevin, but rather is relevant to establishing the immediacy of granting the prejudgment remedy of replevin by the Court. It is the practical perspective, versus any legal requirement in a replevin proceeding, of maintaining the property at issue and providing necessary and proper care for an animal which was not cared for such that it's current obesity creates grave risks to its health and survival if not immediately addressed.

Defendant Malwitz is not capable of properly providing for Happy, who gained over 43% percent of his body weight while under her control, to the point of being severely obese. She repeatedly refused to have Happy examined and treated for any

of a host of potential medical issues and complications, providing no explanation as to why this refusal occurred and continued for six months. This creates the immediacy for the Court to grant the prejudgment remedy of replevin.

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CERTIFICATION

This is to certify that a copy of the foregoing has been sent by email transmission, to the following counsel of record this 20th day of June, 2019:

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