

DOCKET NO. FST CV-19-502129  
SUPERIOR COURT  
STAMFORD-NORWALK  
JUDICIAL DISTRICT

ANIMALSRFAMILY, INC.

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SUPERIOR COURT

V.

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JUDICIALDISTRICT

OF STAMFORD

SUNRISE ASSISTED LIVING  
OF STAMFORD AND  
MARIE MALWITZ

AT STAMFORD

JULY 10, 2019

**MEMORANDUM OF DECISION RE:**  
**PLAINTIFF'S APPLICATION FOR PREJUDGMENT REMEDY (101.00),**  
**DEFENDANT SUNRISE'S MOTION TO STAY (107.00), AND**  
**DEFENDANT MALWITZ' MOTION TO STAY (108.00)**

The plaintiff has commenced this replevin action, together with a request for a prejudgment remedy, against the defendants seeking possession of a dog named Happy. Each of the defendants has filed a motion to stay.

Many of the underlying facts are undisputed. The plaintiff is an animal rescue organization. Several years ago, it became aware that Happy, then in North Carolina, was in distress. The plaintiff transported Happy to Connecticut to nourish it and, ultimately, to place it up for adoption by appropriate caregivers. The plaintiff decided upon the defendant, Sunrise Assisted Living of Stamford ("Sunrise") for that purpose. In 2012, the plaintiff and Sunrise entered into an adoption agreement. Among other provisions in the agreement, the plaintiff retained the right to reclaim Happy if he was not adequately cared for, and it provided that Sunrise would not transfer possession or ownership of Happy to any third party without the prior consent of the plaintiff. The agreement also provided that any disputes thereunder would be resolved by arbitration.

The plaintiff tracked Happy's welfare for about a year; thereafter, Happy remained under the care, custody and control of Sunrise. Sometime thereafter, in approximately 2016, Sunrise "retired" Happy from active service. It gave Happy to the defendant, Marie Malwitz, who was an employee of Sunrise at that time. Sunrise had inexplicably "forgotten" about the adoption agreement. There is no evidence suggesting that Malwitz had been aware of the adoption agreement. Thereafter, Malwitz took on the care of Happy.

The plaintiff became aware of the transfer on December 24, 2018. Its principal, Nicole Bruck, saw Happy on a Stamford sidewalk; Malwitz was nearby. At that point, Happy was several years older, heavier, and he had several "masses" on his legs. Bruck approached and spoke with Malwitz, and she offered to pay for an examination of Happy by the plaintiff's veterinarian. Malwitz refused. Bruck then contacted Sunrise, and Sunrise admitted its mistake in transferring Happy. Sunrise contacted Malwitz, and asked her to bring Happy in so that he could be returned to the plaintiff. Malwitz refused, and she tendered her resignation to Sunrise. From that point forward, Malwitz has retained Happy. This litigation ensued.

"In Connecticut, replevin proceedings are governed by statute rather than by the rules that apply to common-law actions of replevin." *Cornelio v. Stamford Hospital*, 246 Conn. 45, 49, 717 A.2d 140 (1998). General Statutes § 52-515 provides: "[t]he action of replevin may be maintained to recover any goods or chattels in which the plaintiff has a general or special property interest with a right to immediate possession and which are wrongfully detained from him in any manner, together with the damages for such wrongful detention." To prevail on a claim for a prejudgment remedy of replevin pursuant to § 52-515, the plaintiff must establish by probable cause that (1) the property at issue is a good or chattel; (2) the plaintiff has a property interest in the subject property; (3) the plaintiff has a right to immediate possession; and (4) the

defendant is wrongfully detaining the property. See *Cornelio v. Stamford Hospital*, supra, 246 Conn. 49.

A replevin action “is not a contract action and, thus, it is not within the court’s power to determine which party has superior *title* to the animal. . . . [A] replevin action . . . involves a comparison of the superiority and inferiority of competing rights to *possess* the animal.” (Emphasis in original; footnote omitted.) *Angrave v. Oates*, 90 Conn. App. 427, 430, 876 A.2d 1287 (2005). Our Supreme Court has stated that “[t]he action of replevin is founded in tort. There must be a tortious taking or detention of property; a mere breach of contract is not sufficient. Hence it is no remedy to enforce a contract or recover damages for its non-performance.” *Mead v. Johnson*, 54 Conn. 317, 319, 7 A. 718 (1886). “A court’s finding of the right to immediate possession in a replevin action raises a question of fact.” *Angrave v. Oates*, supra, 90 Conn. App. 429.

Although there are many cases discussing replevin proceedings regarding disputes over the ownership of pets, there does not appear to be Connecticut case law concerning the precise issue raised in this case. There is, however, a New Jersey superior court case that is instructive. *Arguello v. Behmke*, Docket No. HNT-C-14002-06, 2006 WL 205097 (N.J. Super. Ct. Ch. Div. 2006). In *Arguello*, the plaintiff, the owner of the subject dog, left the dog at an emergency shelter prior to Hurricane Katrina’s impending landfall in Louisiana. *Id.* The plaintiff gave written instructions to the shelter to contact her if the shelter closed and she needed to pick up her dog. *Id.* When the plaintiff returned to the shelter, she discovered that her dog had been sent to a rescue group in New Jersey and subsequently adopted by the defendant. *Id.* The defendant, who lacked any knowledge that the plaintiff owned the dog, refused to return it to the plaintiff. *Id.* Thereafter, the plaintiff brought a writ of replevin for the return of her dog. *Id.* The court, in

ordering the return of the dog to the plaintiff, relied upon the clear terms of the written agreement between the plaintiff and the shelter, which provided that the shelter was obligated to keep the dog at least until the date when the plaintiff attempted to pick up her dog. *Id.* The court further explained that pursuant to the terms of the written agreement, the shelter had no legal right to move the dog to the adoption agency in New Jersey prior to first contacting the plaintiff. *Id.*

In the present case, the parties offered evidence concerning the care of Happy following Happy's transfer to Sunrise, and his later transfer to Malwitz. On the basis of that evidence, the court would find that Malwitz did not provide an appropriate level of care for Happy. This is not to say that Malwitz lacked care and affection for Happy; she does care for him. This is corroborated by the fact that, notwithstanding the demand of Sunrise to return Happy, Malwitz refused to do so and she resigned. However, what might be in the "best interests" of Happy is largely irrelevant in a replevin action. See, *Angrave v. Oates*, supra, 90 Conn. App. 429, n. 3. Malwitz conceded this during her closing arguments. There is more than probable cause to establish that the plaintiff is entitled to a prejudgment remedy of replevin against Malwitz. This is a regrettable situation brought about by the failure of Sunrise to abide by the adoption agreement. Though Sunrise does not have present possession of Happy, it was clearly complicit in a transfer of Happy to Malwitz.

Finally, each defendant has filed a motion to stay the proceedings based upon the arbitration provision in the adoption agreement. The Sunrise motion must be granted. This is because both the plaintiff and Sunrise were signatories to the adoption agreement, and the arbitration provision was clear and unambiguous that the parties intended to arbitrate their differences. The court should give effect to those terms. *Skolnik & Sons v. Heyman*, 7 Conn. App. 175,

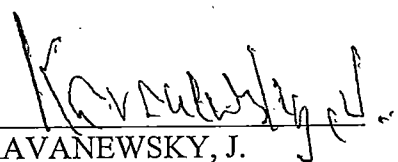
179, 508 A.2d 64, cert. denied, 200 Conn. 803, 510 A.2d 191 (1986).

However, the defendant Malwitz' motion for stay must be denied. Malwitz was not a party to the adoption agreement, and the plaintiff has no duty to arbitrate with her. The obligation of arbitration can only be created by contract. Arbitration of a dispute cannot be compelled where the parties have not agreed to be bound thereby. *Wesleyan University v. Rissil Construction Associates, Inc.*, 1 Conn. App. 351, 354-55, 472 A.2d 23, cert. denied, 193 Conn. 802, 474 A.2d 1259 (1984).

On the basis of the foregoing, the court enters the following orders:

- 1) The defendant, Sunrise Assisted Living of Stamford's motion to stay is granted, pending arbitration;
- 2) The defendant, Marie Malwitz' motion to stay is denied;
- 3) The plaintiff's application for a prejudgment remedy in replevin against the defendant, Marie Malwitz, is granted, and Malwitz is ordered to return the dog, Happy, to the plaintiff within fifteen days.

So ordered.

  
KAVANEWSKY, J.

DECISION ENTERED IN ACCORDANCE WITH THE  
FOREGOING 7/10/19.  
ALL COUNSEL AND SELF-REPRESENTED PARTIES OF  
RECORD NOTIFIED ON 7/10/19.  
JDNO WAS SENT.

  
CRISTINA COPERSINO, TAC