SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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M & M ENVIRONMENTAL,

Plaintiff,

- v -

BARRY MYRICK,

Defendant.

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INDEX NO. 155467/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 107, 108, 109, 110, 111, 112, 136, 137

were read on this motion to/for ORDER OF SEIZURE.

Plaintiff, a pest control company that uses dogs to sniff out bed bugs, moves by order to show cause pursuant to CPLR §§7102, 6301 and 6313 for turnover and recovery of a dog trained to sniff for bedbugs named Roxy; an order of seizure of Roxy; an order restraining defendant and those acting on his behalf from posting statements on any websites concerning plaintiff; and an order directing defendant to remove certain posts concerning plaintiff.

BACKGROUND

There is no dispute that Roxy is a specially trained bed bug sniffing dog and that defendant took custody of her when he became employed by plaintiff four years ago. At that time defendant signed a Canine Handler Agreement wherein he agreed, inter alia, that he "must return Roxy to M&M immediately upon the request of the Employer or upon the conclusion of my employment" (NYSCEF Doc No 21). Plaintiff supplied defendant with the necessary equipment and supplies so that Roxy and defendant could work together visiting homes and

business to determine whether bed bugs were present. If bed bugs were detected by Roxy, defendant would discuss eradication options with the resident or business representative. During the past four years that Roxy has resided with defendant, plaintiff has paid for her food and veterinary care (affd of Timothy Wong, plaintiff's president NYSCEF Doc No 11 and defendant's affd NYSCEF Doc No 108).

There is a dispute as to whether defendant was furloughed in March, 2020, and later laid off as defendant contends (NYSCEF Doc No 108 ¶ 11) or whether he decided he did not want to work in March, 2020 because of the COVID-19 pandemic as plaintiff contends (NYSCEF Doc No 11 ¶ 12). In any event, defendant never returned to work and never returned Roxy to plaintiff notwithstanding plaintiff's requests that he do so.

There is also a dispute about social media posts about plaintiff and whether they were posted by defendant or at his behest. Plaintiff asserts that defendant falsely states on a GoFundMe page and in a YouTube video that he was laid off by plaintiff when the COVID-19 pandemic hit New York; that the company left Roxy with him, not asking for her return until three months later in mid-June; and that plaintiff abandoned Roxy and did not care for Roxy (NYSEF Doc No 11 ¶¶ 56 – 63). Plaintiff contends that these and other statements by defendant are false because defendant was not laid off, he refused to return to work; that plaintiff continued to seek clarification from defendant on when he would be returning to work throughout March and April; and that on May 7, 2020 plaintiff informed defendant that Roxy would have to be returned (affd Whitney Green, plaintiff's HR manager NYSCEF Doc No 12 ¶¶ 3 – 17). Plaintiff alleges defendant and his agents and/or third parties directed and/or encouraged by defendant engaged in an online campaign of threats and blackmail to damage plaintiff's business and reputation (NYSCEF Doc No 11 ¶¶ 64 – 77). Defendant denies that that he personally published

anything about his circumstances with plaintiff or that he encouraged anyone else to publish any defamatory statements about plaintiff. Defendant contends that none of the online posts raised by plaintiff identify plaintiff by name (NYSCEF Doc No 108 ¶¶ 24 – 26).

DISCUSSION

A preliminary injunction will only be issued if plaintiff demonstrates, with convincing evidentiary support, a likelihood of success on the merits, irreparable injury absent granting of a preliminary injunction, and that a balancing of equities favors its position. CPLR 6301; *Nobu Next Door, LLC v. Fina Arts Housing, Inc*., 4 N.Y.3d 839, 840 (2005); *LAIG v. Medanito S.A.*, 130 A.D.3d 466 (1st Dep't 2015). Here, plaintiff has not met any of these elements.

Return of Roxy

Plaintiff argues that it is entitled to have Roxy returned to it because it has met the requirements under CPLR § 7102 to establish its superior right to possess Roxy through the Canine Hander Agreement and the affidavit of Timothy Wong. Plaintiff contends that it requires Roxy's return so that she can resume her bed bug sniffing duties on plaintiff's behalf. Defendant counters that Roxy is more than mere property or an instrument of business; she is a member of his family and returning her to plaintiff would cause emotional upheaval for Roxy, defendant and defendant's wife.

"An order of seizure of chattel is not a final disposition of a matter but is a pendente lite order made in the context of a pending action . . ." (*Southeast Fin., LLC v Broadway Towing, Inc.*, 117 AD3d 715 [2nd Dept 2014]). To obtain an order of seizure, a plaintiff must present an affidavit establishing, inter alia, that the chattel is wrongfully held by the defendant, the value of the chattel, and that there is no defense known to the plaintiff (CPLR § 7102 [c]). The court "*may*" grant an order directing the sheriff to seize the chattel "upon a finding that it is probable

the plaintiff will succeed on the merits" (CPLR § 7102 [d] [1]) of its claim that it has a superior right to the chattel (*Southeast Fin.*, 117 AD3d at 715). Notably "[a]n action to recover a chattel is concerned with which party has the right to possession rather than in whom title is vested" (*Byrne Compressed Air Equipment Co. v Sperdini*, 123 AD2d 368, 369 [2nd Dept 1986]). In other words, the title holder of the chattel does not necessarily have the superior right to possession.

Traditionally under New York law, dogs and other companion animals such as Roxy have been treated as personal property (*see Schrage v Hatzlacha Cab Corp.*, 13 AD3d 150 [1st Dept 2004]). However, in light of the many protections afforded animals under the law, a growing body of case law has started to recognize that dogs fall within a special category of property that is treated differently from other types of personal inanimate property (*Ferger v Warwick Animal Shelter*, 59 AD3d 68, [2nd Dept 2008] [observing that trusts may now be created for pets upon the death or incapacitation of their human companions and pets may now be included in orders of protection issued by Family Court]). The question then arises what standard should be applied when determining custody and ownership of this special category of personal property.

In *Travis v Murray*, the court, in the context of a divorce action, was called upon to decide with whom Joey, a miniature dachshund, should live (42 Misc. 3d 447 [SC NY Co 2013]). After a thoughtful and extensive survey of the law concerning pets, the *Travis* Court determined that the most appropriate standard to apply when deciding with whom a pet should

reside is the one found in the First Department case, *Raymond v Lachmann (*264 AD2d 340, 341 [1st Dept 1999]), the "best for all concerned" standard[1] (*id.* at 460).

The *Travis* court detailed the factors to consider when applying the "best for all concerned" standard and indicated that it would hold a hearing at which the parties would be given an opportunity to prove not only why she will benefit from having Joey in her life but why Joey has a better chance of living, prospering, loving and being loved in the care of one spouse as opposed to the other (*id.*). The factors the Court set out include who bore the major responsibility for meeting Joey's needs (i.e. feeding, walking, grooming and taking him to the veterinarian) and who spent more time with Joey on a regular basis (*id.*; *see also LFM v SRM*, 2018 NYLJ LEXIS 2851; Aug. 24, 2018 at 34 [SC Nassau Co] [applying best for all concerned standard and considering the same factors]). Outside the matrimonial action context, trial courts have also applied the best for all concerned standard when determining ownership and custody of pets (*Mitchell v Snider*, 51 Misc 3d 1229 [Civ Ct NY Co 2016] [replevin action between former paramours]; *Ramseur v Askins*, 44 Misc 3d 1209 [A] [Civ Ct Bx Co 2014] [replevin action between nephew and aunt]; *see also Hennet v Allan*, 543 Misc 3d 542 [SC Albany Co 2014] [citing *Travis* in determining that the dispute between two former paramours required a hearing as to which party "has the most genuine right of possession"]).

[1]Other courts have cited *Raymond* for the proposition that the appropriate standard is a "best interest of the animal" standard. (*Feger*, 59 AD3d at 72 [deciding appropriateness of a protective order to prevent disclosure of the identities of the donor and adoptive owner of a cat sought by plaintiff]; *LeConte v Lee*, 35 Misc. 3d 286, 288 [Civ Ct, NY Co 2011] [deciding replevin action between former paramours]). This court agrees with the *Travis* court that the courts in *Feger* and *LeConte* "apparently confused the [*Raymond*] decision's use of the term 'best for all concerned' with the more familiar term 'best interest," and that the court in *LeConte* "nonetheless engaged in a thoughtful analysis of matters bearing on the well-being of the dog Bubkus . . ." (*Travis*, 42 Misc. 3d at 458 FN 5).

While plaintiff may have purchased Roxy, and there is no dispute that plaintiff did, the question is not whether plaintiff holds "title" to her but rather whether plaintiff or defendant has the superior right to custody of Roxy taking into account that she falls within a "special category of property." When resolving competing claims of who owns a dog, application of the best for all concerned standard is appropriate because it takes into account the special nature of dogs - their needs and well-being - as well as the competing claims by the parties.

Applying the best for all concerned standard and the straightforward factors set out by the court in *Travis*, on this record, plaintiff has not established a likelihood of success on the merits to warrant ordering Roxy's return to plaintiff. Plaintiff does not submit evidence that it endeavored to meet any of Roxy's needs such as feeding, walking and grooming her. Plaintiff merely reimbursed defendant for food and veterinarian care; defendant has been the party responsible for ensuring that Roxy has been properly feed and kept in good health. Footing the bill for food and veterinarian care, without more, is insufficient to establish that plaintiff was meeting Roxy's needs. Nor does plaintiff allege that any of its other employees or principles spent any time with Roxy on a regular basis and there is no dispute that she has lived with defendant for the past four years.

Prime evidence on this record that Roxy is well cared for by defendant was not submitted by defendant but rather by plaintiff. The YouTube video[1] plaintiff linked to in its papers demonstrates that defendant and Roxy have developed a deep mutual bond between them over the last four years. Removing Roxy from the home where she has grown and thrived, as evidenced in the YouTube video, for the past four years would likely cause her a great deal of distress (https://www.aspca.org/pet-care/dog-care/common-dog-behavior-issues/separation-

[1] Although plaintiff does not sufficiently authenticate the video, defendant does not dispute that he is in it and therefore, it may be considered (*accord People v Goldman*, 2020 NY Slip Op 05977 at ** 6 [Oct. 22, 2020]).

anxiety ["Separation anxiety is triggered when dogs become upset because of separation from their guardians, the people they're attached to."]) and would not be in her or defendant's best interest. Plaintiff's expense in acquiring Roxy and any compensable quantifiable business loses incurred as result of her not being deployed on plaintiff's behalf may be awarded at a future date and do not outweigh the harm it will likely cause to Roxy and defendant by ordering Roxy's return to plaintiff. Therefore, plaintiff has failed to show a likelihood of success on the merits on its claim that it should regain custody of Roxy, irreparable injury absent regaining custody of Roxy and a balancing of equities in its favor. Indeed, the YouTube video submitted by plaintiff demonstrates likely irreparable injury to defendant (and Roxy) should Roxy be returned to plaintiff and that the equities are strongly in defendant's favor.

Accordingly, that portion of plaintiff's order to show cause seeking an order of turnover and recovery and an order of seizure of Roxy must be denied.

Injunction enjoining website postings about plaintiff

Plaintiff argues that certain postings on various websites about plaintiff were made by defendant or at his behest and are defamatory and libelous per se. These statements according to plaintiff are injurious to their business or trade.

However, none of the printouts of postings relied upon plaintiff are properly authenticated. Several of the alleged postings annexed as exhibits to Wong's affidavit in support of plaintiff's arguments do not identify the website on which the postings appear and are not otherwise identified much less authenticated by Wong (Exs. 24, 25, and 28). While the remaining postings appear to be from Instagram (Exs. 21, 22, 23, 26 [unreadable], 27, 30, 31) and one from GoFundMe (link in ¶ 58 [a] of Wong's affd), plaintiff fails to demonstrate that the printouts of the postings are accurate depictions thereof and that they were posted by defendant

(*People v Price*, 29 NY3d 472, 478 – 480 [2017] [suggesting proper authentication of printouts from social media accounts requires proof that the depiction is accurate and attributable to a certain person]).

The only remaining posting relied upon plaintiff is the YouTube video and as noted above, although it also is not properly authenticated, defendant does not deny that he appears in the video and therefore, it may be considered.

While plaintiff complains that the video is defamatory, plaintiff does not assert a cause of action for defamation against defendant. The closest cause of action to a defamation claim is plaintiff's ninth cause of action, tortious interference with a prospective economic advantage (NYSCEF Doc No 16). "To prevail on a claim for tortious interference with business relations in New York, a party must prove (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party" (*Amaranth LLC v JP Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). "Defamation is a predicate wrongful act for a tortious interference claim" (*id.*). The elements of a defamation claim are "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). The truth or substantial truth of the statement is an absolute defense (*id.*).

Here plaintiff complains that the statements that defendant was laid off and that it abandoned Roxy are false. However, these statements were not made by defendant in the YouTube video but rather by others. In any event, even if the statement could be attributable to

defendant and its falsity established, plaintiff would only have satisfied one of the elements of a tortious interference with business relations claim, the wrongful act. Plaintiff makes no showing of the remaining three elements of the claim, that it had a business relationship with a third-party, known to defendant with which defendant intentionally interfered and that his interference caused injury to plaintiff's relationship with that third-party. Consequently, plaintiff fails to show a likelihood of success on the merits on its claim for tortious interference with a prospective economic advantage. Accordingly, plaintiff's application for an order restraining defendant and those acting on his behalf from posting statements on any websites concerning plaintiff; and an order directing defendant to remove certain postings concerning plaintiff must be denied.

Accordingly, based on the foregoing, it is

ORDERED that the order to show cause is denied in its entirety.

12/7/2020
DATE

PAUL A. GOETZ, J.S.C.

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**