

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

-----X
MARGARET HEALY,

plaintiff-appellant,

- against -

SLANEY O'HANLON and SUSAN McCARTHY,

defendants-respondents,
-----X

ORIGINAL
Index No.: 21646/11

Appellate Division
Docket No.:

PLAINTIFF-APPELLANT'S MEMORANDUM OF LAW IN
SUPPORT OF ORDER TO SHOW CAUSE

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Preliminary Statement

This memorandum of law is respectfully submitted by plaintiff-appellant Margaret Healy (“plaintiff”), in support of staying the Order, dated March 6, 2012, of The Honorable Yvonne Lewis, J.S.C., entered on March 14, 2012 (hereinafter the “Order”) pending hearing and determination of the appeal on the merits and, alternatively, for leave to appeal the Order and for an interim stay pending a hearing and determination of this motion.

The critical, novel and unprecedented issue presented is the Order of the Court Below ordering the disabled plaintiff to give-up her service dog to the defendants for “visitations,” in violation of the plaintiff’s statutorily guaranteed right under the New York City Civil Right Law §47-b (and the Americans With Disabilities Act [ADA]) to have her service dog named Lucy in her immediate custody.

Alternatively, the second critical, novel and unprecedented issue is the consideration and award of visitation by the Court Below despite the well-settled law that a dog is personal property subject to an action in replevin to which “visitation” has never applied throughout all New York jurisprudence, and based on nothing more than an allegation of purported past ownership. In awarding visitation, the Court Below rejected a “best interests” standard held in custody cases in favor of an entirely new legal standard created by the Court Below of “no deterrent in the way of suspected harm either to Ms. Healy or Lucy in ordering visitation,” which new legal standard was not enunciated until after the close of evidence and after summations and was, in any event, improperly applied against the weight of the evidentiary facts.

It is undisputed that the defendants abandoned Lucy as a puppy at eight months’ old and Lucy thereafter came into the plaintiff’s care. Plaintiff has had sole exclusive ownership and custody of Lucy for over two (2) years and had not heard from either defendant Slaney O’Hanlon

(“Slaney” or “defendant”) or Slaney’s mother, defendant Ms. McCarthy, during that entire time. It is undisputed that in September, 2011, Slaney and Slaney’s mother acted violently and menacingly, by threatening and intimidating the plaintiff with road rage and by attempting to forcibly gain access to plaintiff’s apartment building, demanding that plaintiff turn over Lucy to them. The completely inappropriate menacing manner in which they sought to take Lucy led directly to the filing of the summons and complaint and an order to show cause for a TRO restraining defendants from such misconduct. These papers commenced the instant an action in replevin concerning ownership of Lucy. The TRO, dated September 23, 2011, was granted restraining defendants from any such further misconduct and coming near plaintiff or attempting to gain possession of Lucy.

On December 19, 2011, defendant’s attorney made an application for Slaney to have unspecified “visitation,” with Lucy while the replevin action is pending.

Ultimately, the matter came on for a Hearing before the Court Below on February 23, 2012. The Court Below ordered plaintiff to give-up her service dog Lucy to the defendant Slaney for two (2) week-long exclusive “visitations,” beginning on March 24, 2012. The decision of the Court Below raises critical and fundamental issues which are novel and militate heavily in favor of granting a stay pending the appeal or, alternatively, a stay pending the hearing and decision of this application.

The first critical, novel and unprecedented issue is the plaintiff’s guaranteed right to have her service dog in her immediate custody under the New York Civil Rights Law (and the ADA), because Lucy is registered and licensed by the New York City Department of Health and Mental Hygiene as plaintiff’s service dog. That law is clear and well-settled that a disabled person such

as plaintiff has a guaranteed right, that cannot be limited or restricted, to have her service dog with her in her immediate custody.

Alternatively, a second critical, novel and unprecedented issue is the consideration and awarding of two (2) week-long exclusive visitations by the Court Below despite the well-settled law that a dog is personal property subject to an action in replevin, based on nothing more than an allegation of purported past ownership. In awarding visitation, the Court Below rejected a “best interests” standard in favor of a new legal standard created by the Court Below of “no deterrent in the way of suspected harm either to Ms. Healy or to Lucy in ordering visitation.” This legal standard was not enunciated until after the close of evidence. In any event, the Court Below improperly applied its newly-created standard against the weight of the evidentiary facts. The Court Below also erred in considering visitation based on nothing more than an allegation of purported past ownership by erroneously applying and finding a likelihood of success on the merits although the Hearing concerned solely visitation, not ownership, custody or possession, and defendants made absolutely no such showing at all.

Accordingly, a stay is warranted so that the Appellant Division may decide the urgent, critical and novel issues here presented, including whether a disabled person can be deprived of her statutorily guaranteed right to have her service dog in her immediate custody. It is also warranted so that the Appellate Division can also decide the critical and novel, unprecedented issue of whether visitation of a dog with respect to an action in replevin is possible and the propriety of the new legal standard created by the Court Below with respect to “visitation” of personal property.

Summary of Facts

Please see the accompanying original Affidavit of the plaintiff Margaret Healy, sworn-to the 15th day of March 2012, with attached exhibits, which is incorporated-by-reference with the same force and effect as though actually herein repeated at length word-for-word. Please also see the accompanying original Affidavit of Lucy's veterinarian, Marc Siebert, DVM, CVM, sworn-to the 15th of March, 2012; and the accompanying original Affidavit of Counsel Michael J. Devereaux, Esq., sworn-to the 19th of March, 2012, with attached exhibits, are also all incorporated-by-reference with the same force and effect as though actually herein repeated word-for-word.

Point 1

PLAINTIFF'S STATUTORILY GUARANTEED RIGHT TO HAVE HER SERVICE DOG LUCY IN HER IMMEDIATE CUSTODY IS VIOLATED BY ORDER OF COURT BELOW GRANTING DEFENDANTS VISITATION

The New York Civil Rights Law (and the ADA) guarantees plaintiff's right to have her service dog servicing her:

McKinney's Civil Rights Law §47-b

§47-b. Miscellaneous provisions

"1. Persons with a disability accompanied by... service dog[s] shall be guaranteed the right to have such dog[s] in their immediate custody..."

(McKinney's Civil Rights Law §47-b). Paragraphs 2 and 6 of Civil Rights Law §47-b provide that:

"2. No person or legal entity, public or private...shall [impose] any conditions or restrictions not specifically set forth in this article...on the person's rights as set forth herein."

...

“6. Any law, rule, or regulation conflicting with any provision of this article is, to the extent of said conflict only, deemed to be superseded by the provisions of this article.”

(id.) Paragraph 6 plainly mandates that “[a]ny law, rule, or regulation conflicting with plaintiff’s statutorily guaranteed rights ...is... deemed superseded,” by the right guaranteed in Civil Rights Law §47-b (6) (id.)

“Disability,” is statutorily defined as follows:

“21. The term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided...”

(id.) The primary care physician treating plaintiff for more than fifteen (15) years, James A. Underberg, M.D., attested to plaintiff’s long-term disability, and to Lucy servicing her as her service dog. A true and accurate copy of Dr. Underberg’s letter is attached as Exhibit 3 to the accompanying original Affidavit of the Plaintiff Margaret Healy, sworn-to the 15th of March, 2012 (“Healy Affidavit”). Dr. Underberg’s letter was submitted to the New York City Department of Health and Mental Hygiene and complied with that Department’s rules, regulations and requirements.

“Service dog” is also a statutorily-defined term as follows:

“33. The term "service dog" means any dog that is trained to work or perform specific tasks for the benefit of a person with a disability by a recognized service dog training center or professional service dog trainer, and is actually used for such purpose.”

(id.) Lucy is a trained service dog accepted, registered and licensed as a service dog by the New York City Department of Health and Mental Hygiene. A true and accurate copy of this Department's letter, dated January 3, 2012, is attached as Exhibit 7 to the Healy Affidavit, along with the trainer's letter that Lucy successfully completed the service dog training course and the requirement for The American Kennel Club Canine Good Citizen Certificate, dated November 28, 2011.

The defendants admitted that Lucy has been in plaintiff's custody most of her life. Please see ¶61 of the marked pleadings attached as Exhibit 3 to the Healy Affidavit.

Lucy is therefore plaintiff's service dog servicing plaintiff to which plaintiff has a statutorily guaranteed right to have her service dog in her immediate custody (McKinney's Civil Rights Law §47-b).

Accordingly, the Order of the Court Below ordering plaintiff to transfer possession, in effect, "custody" to defendant Slaney O'Hanlon for two (2) week-long exclusive "visitations" violates and supersedes plaintiff's statutorily guaranteed right to have her service dog servicing her in her immediate custody. The Order of the Court Below is contrary to applicable law, and against the weight of the evidence, and misapplies, misconstrues and/or misapprehends the law and evidence, and constitutes an abuse of discretion. As such, plaintiff respectfully requests a stay of the Order of the Court Below pending perfection, hearing and decision of her appeal on the merits and a stay of the Order pending the hearing and decision of her instant application.

A. Can Plaintiff's Statutorily Guaranteed Right to Immediate Custody Of Her Service Dog Lucy Be Pre-empted by Visitation Based On Nothing More Than An Allegation of Purported Part Ownership?

An allegation until tried to the jury or resolved by summary judgment, remains just an allegation. Does the allegation of ownership pre-empt the plaintiff's statutorily guaranteed right to immediate custody of her service dog Lucy? Do allegations negate the statutory guarantee provided under Civil Rights Law § 47-b (and under the ADA)? There is absolutely no precedent or statutory exception for the visitation ordered by the Court Below. Quite the contrary, the Court Below, in ordering visitation, is violating Civil Rights Law § 47-b (1) (2) and (6).

B. Ordering Two (2) Week-Long Exclusive Visitations Before the Allegation of Purported Past Ownership Is Tried and Determined As Erroneous and Unjust

To favor defendants with an award of visitation, the Court Below not only over-turned well-settled law that a dog is personal property and find for the very first time in New York jurisprudence and, for that matter, all of jurisprudence, that a right of visitation exists with respect to personal property, but also, very importantly, the Court Below had to pre-empt the plaintiff's statutorily guaranteed right under Civil Rights Law § 47-b to immediate custody of her service dog by dis-crediting the designation, registration, listing and licensing of plaintiff's dog as a service dog by the Department of Health and Mental Hygiene. The Court Below erroneously and unjustly did so.

Point 2

COURT BELOW OVER-TURNED WELL-SETTLED LAW
THAT A DOG IS PERSONAL PROPERTY SUBJECT TO AN
ACTION IN REPLEVIN TO WHICH VISITATION HAS
NEVER APPLIED

It is well-settled, even hornbook, law that in New York "... a dog is personal property." Since under New York law, a dog is property, the only means to recover custody of a dog is a replevin action.

There is no statutory basis nor any basis in law to permit visitation of personal property whose ownership is disputed during the replevin action. Accordingly, it is flatly contrary to all applicable law and a gross abuse of discretion to permit defendants to do something that the law has never permitted, that is, visitation with Lucy pending the outcome of this action sounding in replevin.

A. There Is No Statutory Or Legal
Authority Nor Precedent Permitting
"Visitation" of Personal Property

Dogs are "personal property" (*Freger v. Warwick Animal Shelter*, 29 AD3d 515, 516, 814 NYS2d 700, 702 [2d Dept 2006] (pets are personal property limiting recoverable damages); *Jason v. Parks*, 224 AD2d 494, 495, 638 NYS2d 170 [2d Dept 1996] ("It is well established that a pet owner in New York cannot recover for emotional distress caused by the negligent destruction of a dog."); *Schrage v. Hatzlacha Cab Corp.*, 13 AD3d 150, 788 NYS2d 4, 5 [1st Dept 2004] ("pets are treated under New York law as personal property..."); *Young v. Delta Air Lines, Inc.*, 78 AD2d 616, 432 NYS2d 390 [1st Dept 1980] (recoverable damages for death of passenger's dog limited); *Fowler v. Town of Ticonderoga*, 131 AD2d 919, 921, 516 NYS2d 368, 370 [3d Dept 1987] ("a dog is personal property and damages may not be recovered for mental distress..."); *Johnson v. City of New York*, 20 Misc3d 1141(A), 872 NYS2d 691 [Supreme Court,

Kings County 2008] (“a dog is personal property”); see also, e.g., 26 U.S.C.A §6334(a)(2) (2006) (animals, including poultry and livestock are property exempt from levy for unpaid taxes); 25 U.S.C.A. §453 (2006) (animals, including livestock are personal property); 25 U.S.C.A. §640d-12 (2006); 12 U.S.C.A. §348 (2006); *Gluckman v. American Airlines, Inc.*, 844 FSupp 151, 158 [SDNY 1994] (“overwhelming authority...” that pets are personal property); *Fackler v. Genetzky*, 595 NW2d 884, 891 [Supreme Court, Neb. 1999] (animals are regarded as personal property)).

Despite the defendants’ best efforts to convert this case into something akin to a child custody matter or to drag this case into the pending divorce action between the plaintiff’s brother and Ms. McCarthy, this lawsuit concerns solely ownership of what the law deems “personal property,” to which visitation does not apply, especially, based on nothing more than an allegation of purported post ownership.

Point 3

COURT BELOW ERRONEOUSLY CREATED AND APPLIED
NEW LAW, A NEW LEGAL STANDARD FOR CONSIDERING
AND AWARDED VISITATION OF A DOG WITHOUT EVER
NOTIFYING PARTIES UNTIL AFTER THE CLOSE OF
EVIDENCE AND SUMMATIONS

The Court Below in holding that visitation, applies to personal property for the first time in New York jurisprudence, also erred in creating the new legal standard “no deterrent in the way of suspected harm to Ms. Healy or Lucy,” and, in doing so, only after the close of evidence and after summations.

- A. Had Plaintiff Known New Legal Standard Before the Close of Evidence, Plaintiff Would Have Called Lucy's Veterinarian, Dr. Marc Siebert, VMD, CVA, and Plaintiff's Treating Medical Physician James A. Underberg, M.D.

The Court Below also erred in creating a new legal standard and not enunciating the new legal standard until after the close of evidence and after summations. The Court Below enunciated the new legal standard "no deterrent in the way of suspected harm either to Ms. Healy or to Lucy in ordering visitation," in a decision after the close of evidence and after summations (see p.31 lines 9-21 of the true and accurate copy of Certified Transcript of the Judicially-Mandated Hearing, taken on March 6, 2012, attached as Exhibit 5 to Counsel's Affidavit). Had the Court Below notified the parties that the new legal standard of "no deterrent in the way of suspected harm either to Ms. Healy or to Lucy," was created and being applied, plaintiff would have called the veterinarian Marc Siebert, VMD, CVA, who has been Lucy's veterinarian most of her life. A true and accurate copy of Dr. Siebert's Affidavit, sworn-to the 15th of March, 2012, is attached as Exhibit 7 to Counsel's Affidavit. Dr. Siebert's expertise and his expert opinion within a reasonable degree of veterinarian certainty would have been established.

Point 4

COURT BELOW ERRONEOUSLY FAILED TO CONSIDER AND/OR APPLY "BEST INTERESTS OF LUCY" AND, IN ANY EVENT, FAILED TO CONSIDER THE EVIDENTIARY FACTS AGAINST VISITATION BASED ON NEW LEGAL STANDARD OF "NO DETERRENT IN WAY OF SUSPECTED HARM TO MS. HEALY OR TO LUCY"

The Court Below held as follows:

DECISION

...

18 As to the best interest of the dog, I don't
19 think there is such a standard yet made. I do not
20 think that we can automatically analogize in the best
21 interests of a child to in the best interests of a
22 dog. And so to the extent that it has not existed
23 prior, I guess this court is making it up.

See p. 29 lines 18-23 of the true and accurate copy of the Certified Transcript of the Judicially-Mandated Hearing taken before the Court Below on March 6, 2012, attached as Exhibit 5 to Counsel's Affidavit. The Court, with respect to the "standard," to apply for awarding visitation held:

DECISION

31

...

9 I don't think it is best for this Court to
10 determine what would be the standard for
11 consideration and entitlement in the best interest of
12 the dog because, you see, I, unlike the two parties
13 before me, am not an avid dog lover. I do care about
14 animals, I do, and am very much aware of the
15 attachment that persons and families have made to
16 their dogs and other pets. And as I started with, it
17 seems to me that both parties here are – have shown,

...

18 rather, a great deal of attachment and desire to be
19 with a pet that each of them call their own. I see
20 no deterrent in the way of suspected harm either to
21 Ms. Healy or to Lucy in ordering visitation.

See Exhibit 5, p. 31, lines 9-21. Thus the standard on which the Court Below based visitation was “no deterrent in the way of suspected harm either to Ms. Healy or to Lucy in ordering visitation.” The application of this new legal standard instead of what is in the “best interests” of Lucy is erroneous (*Raymond v. Lachmann*, 264 AD2d 340, 341, 695 NYS2d 308, 309 [1st Dept 1999] (applying “best interests” to determine custody of cat)). Furthermore, and, in any event, the Court Below erroneously failed to properly consider the evidentiary facts in considering and applying the new legal standard ordering visitation.

A. Evidentiary Facts Establish That Plaintiff
Will be Harmed by Order of Court Below
Ordering Visitation Ordering Visitation

Plaintiff testified to the harm caused to plaintiff in not having Lucy in her immediate custody:

1 Direct/Chaves/Healy 70

...

10 Q. So, now that Lucy is a service dog and you use her
11 as a service dog, is that something that she does every day
12 in terms of what you do every day? In other words, do you
13 use her every day as a service dog?

14 A. Pretty much, yes.

15 Q. Can you tell the Court, specifically, not every

16 day, but in general, on an average day, what does Lucy do as
17 your service dog?

18 A. First of all, because she's my service dog, and the
19 whole process, she's with me all of the time, and not matter
20 how far she can go, she's always where I am, even if there's
21 other people in the house. So, if she's – if anything
22 happens to me or even if I were to stumble, she just comes
23 and she stands there.

24 Q. Now, would it be, in your view, detrimental to you
25 if you were not able to have Lucy with you to the same
26 extent that you have her now?

1 Direct/Chaves/Healy 71

2 A. Well --

3 MR. ALTER: Objection.

4 THE COURT: Rephrase.

5 Q. All right. Would it cause you a problem if Lucy
6 was not with you the same amount of time that she is now?

7 A. Yes.

8 MR. ALTER: Objection.

9 THE COURT: You may answer.

10 A. Yes.

11 Q. Can you describe for the Court how that would cause
12 a problem for you?

13 A. Well, I would not have the security that I have now
14 when she's there. And if I need something, she – for
15 instance, if I fell or whatever and I could not get to the
16 phone, she will go, no matter where the phone is, and she
17 will pick it up and bring it to me, so I know that, for
18 instance, she's there were I to have another attack or
19 whatever of Vertigo.

20 Q. Of Vertigo, you're referring to?

21 A. Yes.

See Exhibit 3, pp. 70-71. Plaintiff's testimony is undisputed. No evidence to the contrary was ever proffered.

Moreover, in light of Civil Rights Law § 47-b, plaintiff's harm or injury is certainly evidenced because, as a disabled person, with a statutorily guaranteed right to her service dog in her immediate custody, the taking away of her service dog from her immediate custody is, of course, plainly harm.

**B. Evidentiary Facts Establish That Lucy Will
 Be Harmed by Order of Court Below
 Ordering Visitation**

Lucy's veterinarian, Marc Siebert, VMD, CVA, testified, by his Affidavit, a copy of which is attached as Exhibit 8 to Counsel's Affidavit, establishing that Lucy would be harmed by the Court Ordered visitation. Plainly, a dog that was abandoned and then rescued by plaintiff and continuously in plaintiff's care for over two (2) years would be harmed, certainly bewildered and stunned by being suddenly no longer in plaintiff's presence and care and in totally new environs.

C. Defendants Abandoned Lucy As An Eight Year Old Puppy by Leaving Her in the Care of Her Two (2) Brothers who Attended Colleges Out-of-State

The uncontradicted testimony is that the defendant Slaney O'Hanlon had miserably failed to care for Lucy by abandoning Lucy, as an eight month-old puppy to her two (2) brothers who were away attending college out-of-state and obviously were not caring for Lucy and Lady. The dogs were left alone, uncared for and unloved, without veterinary care, training, etc. Plaintiff, in effect, rescued them and cared for them, including Lucy. During all of the two (2) years, defendants never once checked-in on Lucy or followed-up to ensure she was being properly cared for. Defendants admitted at ¶61 of their answer (Exhibit 3) that Lucy has been in plaintiff's custody for most of Lucy's life and therefore, that plaintiff has exclusively taken care of, trained, fed, bathed, etc., Lucy for most of Lucy's life.

D. Defendants Never Contributed Any Time, Effort Nor Money to Lucy's Care, Feeding, Training, Veterinary Care, Socialization-for Over Two (2) Years

The defendants never contributed any time, effort nor money to the care of Lucy in over two (2) years. They never contributed any time, effort nor money to Lucy's care, including, but not limited to food, training, shelter, and/or veterinary care.

E. Defendants Expended No Efforts to See, Visit or Check-up on Lucy in Over Two (2) Years

It is undisputed that the defendants have had no contact with Lucy for over two years and made no effort to even visit her. At the time that defendants left the home in Manhasset where she was living with Lucy in September, 2009, Lucy was only eight months old. There is no doubt that harm would be caused to Lucy and the plaintiff, if Lucy was not to remain with

plaintiff because plaintiff needs her service dog for her disability and because plaintiff has exclusively loved, taken care of and trained Lucy continuously since Lucy was abandoned by defendants and most of Lucy's life. Allowing broad, unsupervised visitation with strangers in an unfamiliar environment is clearly harmful and stressful.

F. Lucy Received Extensive Training Over the Last Two (2) Years by Plaintiff and by Expert Certified Trainer to Service Plaintiff as Plaintiff's Service Dog With Respect to Plaintiff's Disability

Plaintiff trained Lucy for two (2) years to be her service dog and Lucy underwent extensive expert service dog training by a certified expert trainer to be plaintiff's service dog resulting in a very intimate, very special and emotionally strong bond between Lucy and plaintiff.

G. Plaintiff is Retired and is With Lucy Full Time, Every Day and Night for Over Two (2) Years, Including Walking Lucy for Three (3) Miles Every Day

In stark contrast to the defendants, plaintiff testified that she is retired and has devoted two (2) years of full-time continuous attention and time with Lucy and devote her full-time attention to the care and maintenance of Lucy. Plaintiff walks Lucy three (3) miles per day and it is undisputed that she takes excellent care of her.

H. Defendants Demonstrated Their Unfitness to Any Visitation Because They Engaged in Road Rage Against Plaintiff and Menaced, Threatened and Intimidated Plaintiff

The Court Below failed to take note of the means that defendants employed to take Lucy from plaintiff. They engaged in violent "road rage" against plaintiff and menacingly descended

on her apartment in September, 2011 and sought to force their way into the building thus leading to both police involvement and a Temporary Restraining Order being entered against them in this action based on the threat to plaintiff's physical safety. Since they came to the Court Below with astonishingly unclean hands, the Court Below should not sanction their abandonment of Lucy and inappropriate and unlawful methods of obtaining possession by allowing a broad, unsupervised visitation half of the time.

Point 5

COURT BELOW ERRONEOUSLY FAILED TO TAKE
JUDICIAL NOTICE OF THE REGISTRATION AND
LICENSING OF LUCY AS A SERVICE DOG BY NYC
DEPARTMENT OF HEALTH AND MENTAL HYGIENE AND
OBJECTED TO SAME ONLY AFTER THE CLOSE OF
EVIDENCE AND AFTER SUMMATIONS

“Judicial notice is generally defined as a judge’s utilization of knowledge other than that derived from formal evidentiary proof.” (Weinstein’s Evidence ¶200 [01], at 200-2). The NYC Department of Health and Mental Hygiene registered, listed and licensed the plaintiff’s dog Lucy as a service dog after plaintiff had complied with the Department’s regulatory proven for service dog training and disability. The Department registered, listed and licensed Lucy as a service dog for the plaintiff. A true and accurate copy the Department’s registration, licensing and issuance of the service dog license for Lucy was introduced and marked as evidence at the Hearing as plaintiff’s Exhibit 1 in evidence. It is attached as Exhibit 4 to Counsel’s Affidavit.

Plaintiff testified about her long-term disability, including diagnosis and treatment by her primary care/treating physician James. A Underberg, M.D. Plaintiff testified Dr. Underberg diagnosed and treated her disability and prescribed Lucy as her service dog. A true and accurate copy of the Certified Transcript of the Judicially-Mandated Hearing taken by the Court Below on the 23rd of February, 2012, pp 64-71, is attached as Exhibit 3 to Counsel’s Affidavit.

Plaintiff, by her attorney, requested the Court Below to take judicial notice of the New York City Department of Health and Mental Hygiene's registering and licensing of Lucy as plaintiff's service dog. The Court Below took judicial notice of the fact as follows:

Proceedings

21

2 ... I have here documents
3 which I want the Court to take judicial notice of and
4 which I don't want to surprise my adversary during
5 his visitation hearing. This is a certification that
6 the dog, Lucy, is a service dog for the plaintiff,
7 Margaret Healy.
8 There's an elaborate process requiring proof
9 of a medical condition, which necessitates the use of
10 a service dog. There's a training program for the
11 dog to become a service dog and I have the letter and
12 the license of certification with me. I have a copy
13 for Mr. Alter, and also, a copy for the Court that I
14 intend to use and mark into evidence. I did not
15 want, however, to spring it in the middle of the
16 proceeding at the point in time when we call Margaret
17 Healy.

18 THE COURT: Okay. Are we ready to proceed?

...

(Exhibit 3, p. 9). Based on the Court's taking judicial notice of the New York City Department of Health and Mental Hygiene's registering and listing of Lucy as plaintiff's service dog, plaintiff relied on her sworn-to Hearing testimony that her primary care, treating physician, James A. Underberg, M.D., had diagnosed her disability and treated her disability for more than fifteen (15) years, and prescribed Lucy as her service dog (*id.*, at pp. 64-71). Plaintiff also testified about the process, including training and medical evidence submitted to the New York City Department of Health and Mental Hygiene and the service dog license and medal (*id.*) No further evidence, i.e., the calling of and testimony of Dr. Underberg appeared necessary in light of the Court Below taking judicial notice of the registering and licensing of Lucy as a service dog by the New York City Department of Health and Mental Hygiene.

During the course of the Hearing, the letter by the Department of Health and Mental Hygiene, dated January 3, 2012, registering and listing the dog Lucy as her service dog, together with Lucy's license as a service dog was admitted into evidence as Exhibit 1 at the Hearing. (Exhibit 3, pp. 88-89) (plaintiff's Exhibit 1 in evidence at the Hearing is attached hereto as Exhibit 4 to Counsel's Affidavit.

Judicial notice was properly taken (*Nassau Ins. Co. v. Epps*, 63 AD2d 475, 477 n. 2, 407 NYS2d 225, 228 n. 2 [2d Dept 1978] (judicial notice of letter of the Superintendent of Insurance as if it were regulation although not in N.Y.C.R.R.); *Albano v. Kirby*, 36 NY2d 526, 532, 369 NYS2d 655, 661 [1975] (judicial notice taken of governmental department memorandum); *Rothstein v. City Univ.*, 194 Ad 2d 533, 534, 599 NYS2d 39, 40 [2d Dept 1993] (judicial notice taken of NYC Building Code section); *Andy Assocs., Inc. v. Bankers Trust*, 49 NY2d 13, 23, 424 NYS2d 139, 145 [1979] (judicial notice taken of "block and lot" indexing method of conveyances); *Wheels v. Parking Violations Bureau*, 185 Ad 2d 110, 111, 585 NYS2d 755, 756

[1st Dept] (judicial notice taken of Department of Motor Vehicles practices in assigning license plates), *aff'd*, 80 NY2d 1014, 592 NYS2d 659 [1992]; *Siwek v. Mahoney*, 39 NY2d 159, 163 n. 2, 383 NYS2d 238, 240 n. 2 [1976] (“Data culled from public records is, of course, a proper subject of judicial notice.”); *Brands Meat Corp. v. Cromer*, 146 AD2d 666, 667, 537 NYS2d 177, 178 [2d Dept 1989] (“[T]his court may, in general, take judicial notice of matters of public record; Judicial notice taken of Secretary of State’s certification of dissolution.”); *Patricia A. v. Philip De G.*, 97 AD2d 760, 761, 468 NYS2d 390, 391 [2d Dept 1983] (judicial notice taken that child weighing 4 lbs, 13 oz may be premature); *Erie County Commn. of Social Servs. v. Boyd*, 74 Ad 2d 760, 761, 468 NYS2d 390, 391 [4th Dept 1980] (judicial notice taken that normal period of human gestation is 280 days; no expert testimony on paternity required); *Kelley v. Hitzig*, 71 Misc2d, 329, 330, 336 NYS2d 122, 124-125 [District Court, Nassau County 1972], *aff'd*, 86 Misc2d 42, 382 NYS2d 280 [Appellate Term 2d Dept 1973] (judicial notice taken of general methods of baggage handling employed by airlines need not be alleged or proved); *303 W. 42nd St. Corp. v. Klein*, 46 NY2d 686, 697 n. 6, 416 NYS2d 219, 226 n.6 [1979] (judicial notice taken of the acts and proceedings of government departments, agencies and offices)).

However, after the close of evidence and after summations, the Court Below, in deciding on visitation, despite having had taken judicial notice during the evidentiary phase of the Hearing and admitting into evidence that Lucy was a service dog registered and licensed by the Department of Health and Mental Hygiene, surprisingly held:

“There is no medical evidence of the disability from any medical professional. So, the Court does not believe that the designation by plaintiff and plaintiff’s counsel of Lucy as a service dog is such that the Court must accept it.”

(Exhibit 5; p. 30, line 22 to p. 31, line 1). The Court Below plainly erred in stating that the plaintiff and plaintiff’s counsel, not the New York City Department of Health and Mental

Hygiene, had designated Lucy as a service dog. The Court Below also plainly erred in, after the close of evidence, and after having taken judicial notice, then refusing to take judicial notice of what Her Honor had already taken judicial notice of, namely, the registering and listing of Lucy as a service dog by the Department of Health and Mental Hygiene, and inexplicably disallowing or not crediting plaintiff's uncontradicted Hearing testimony of her disability and of her physician for more than fifteen (15) years, treating her disability and prescribing Lucy as her service dog.

The evidentiary proof that had been submitted to the New York City Department of Health and Mental Hygiene, including the medical documentary evidence of plaintiff's disability (copy attached as Exhibit 6) would have been put in evidence had the Court Below, during the evidentiary phase of the Hearing, before the close of evidence and before summations, held that the Court Below was not taking judicial notice of what the Court Below was obligated to do (*Administrative Code of the City of New York* §1-104(a); *Sansivero v. Garz*, 20 AD2d 723, 247 NYS2d 596 [2d Dept 1964] (pursuant to the *Administrative Code*, judicial notice of rules and regulations of New York City officers and agencies is mandatory); *People v. Patterson*, 169 Misc2d 787, 646 NYS2d 762 [Supreme Court, Kings County 1996]). Additionally, Dr. Underberg would have called to testify to his fifteen (15) years of treating plaintiff and the history of diagnosis and treating plaintiff's disability and prescribing Lucy as her service dog (Exhibit 6).

In any event, the plaintiff testified as to her disability (Exhibit 3, pp. 64-71). Plaintiff's treating physician James A. Underberg, M.D., submitted his letter to the New York City Department of Health and Mental Hygiene attesting to plaintiff's disability and need for Lucy as her service dog. A true and accurate copy of the medical evidence is attached as Exhibit 6. The

Order of the Court Below is therefore erroneous, contrary to the law and statute, against the weight of the evidence, misapplying, misconstruing and misapprehending the law and evidence and constitutes an abuse of discretion.

Conclusion

Based on the foregoing compelling facts and circumstances presenting critical, novel and unprecedented issues, the Appellate Division is respectfully requested to grant the relief herein requested by the plaintiff-appellant's Order to Show Cause, together with such other and further relief as is just and proper in the circumstances.

Dated: March 18, 2012
New York, New York



Michael J. Devereaux, Esq.

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