

<b>Gale v Animal Med. Ctr.</b>
2011 NY Slip Op 33262(U)
September 8, 2011
Supreme Court, Queens County
Docket Number: 11276/10
Judge: Janice A. Taylor
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15  
Justice

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SHELLEY GALE, D.V.M,

Plaintiff(s),

Index No.:11276/10

Motion Date: 7/12/11

- against -

Motion Cal. No.: 16

Motion Seq. No: 3

THE ANIMAL MEDICAL CENTER, WILLIAM MUIR,  
D.V.M., JANET KOVAK MCCLAREN, D.V.M.,  
ANTHONY FISCHETTI, D.V.M, MARY P. ZANELLA,  
MARY C. O'CALLAGHAN, STEPHANIE ELLEN  
HIRSCHFELD,

Defendant(s).

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The following papers numbered 1 - 9 read on this motion by the defendants for an order granting leave to renew their prior motion for summary judgment and dismissal of the complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits-Service.....	5 - 7
Reply Affirmation-Service.....	8 - 9

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action alleging, *inter alia*, fraud and negligence. This action was commenced on May 5, 2010 by the filing of a summons and complaint. By order dated June 1, 2011, this court denied the defendants' motion for summary judgment and dismissal of the complaint on the grounds that the movants failed to annex the certification required by Court Rule 130-1.1(a).

Defendants now move, pursuant to CPLR §2221, for an order granting leave to renew the June 1, 2011 decision. CPLR §2221[e] mandates that a motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination. As the movants have now submitted the required certification, the motion for leave to renew is granted.

Upon renewal, this court will now consider the defendants' motion, pursuant to CPLR §§3212 and 3211, for summary judgment and dismissal of the complaint against them. Specifically, the defendants seek an order, pursuant to CPLR §3211(a)(7) to dismiss

plaintiff's first, second, fourth, fifth, sixth, seventh and eighth causes of action. A motion made pursuant to CPLR §3211(a)(7) can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (See, *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]).

### Relevant Facts

It is undisputed that plaintiff Shelley Gale, D.V.M. and defendants William Muir, D.V.M., Janet Kovak McClaren, D.V.M, Anthony Fischetti, D.V.M., are each veterinarians licensed to practice in the State of New York. It is also undisputed that, on or about June 22, 2009, defendants Mary P. Zanella, Mary C. O'Callaghan and Stephanie Ellen Hirschfeld were employed by the defendant The Animal Medical Center ("Medical Center"). Finally, it is undisputed that, on or about June 22, 2009, plaintiff took her cat "Joey" to the defendant Medical Center for treatment, that she paid for such services with her credit card and that the cat ultimately died on June 25, 2009.

### First, Second and Third Causes of Action

Plaintiff's first, second and third causes of action allege that she was injured by the defendants' failure to secure her informed consent in the treatment, and ultimate euthanasia, of her cat and by the gross negligence and negligence of the defendants.

A review of the complaint reveals that, although plaintiff describes her third cause of action as allegations of negligence, it is really a claim for veterinary malpractice. In order to maintain an action for veterinary malpractice, plaintiff must assert that the defendants deviated or departed deviation or departure from accepted veterinary medical practice, and that such departure was a proximate cause of injury (See, *Guzzi v Gewirtz*, 82 AD3d 838 [2d Dept. 2011]; *DiMitri v Monsouri*, 302 AD2d 420 [2d Dept. 2003]).

A cause of action for lack of informed consent must be predicated on allegations that a plaintiff has suffered some specific loss or damage caused by the lack of consent. This damage must be shown to differ from the alleged damages caused by the ordinary negligence of the defendants (See, *Brady v. Westchester County Healthcare Corp.*, 78 Ad3d 1097 [2d Dept. 2010]; *Schel v. Roth*, 242 Ad2d 697 [2d Dept. 1997]).

Finally, a cause of action for gross negligence can only be maintained where the conduct evinces reckless disregard for the conduct of others or shows clear wrongdoing (see, *Federal Insurance Co. v. Honeywell*, 243 AD2d 605 2d Dept. 1997]; *Colnagi, U.S.A.*,

*Ltd. v. Jewelers Protection Service*, [1993]). A successful claim for gross negligence may result in an award of punitive damages against the defendant (see, generally, *Public Service Mutual Insurance Company v. Goldfarb, et al*, 53 NY2d 392 [1981]). To maintain an action for gross negligence, a plaintiff must assert that the defendants' actions were the result of intentional, wanton or malicious conduct and must plead allegations of wrongdoing that differ from ordinary negligence (See, *Lubell v. Sampson Moving & Storing*, 307 AD2d 215 [1st Dept. 2003]).

Plaintiff's complaint alleges the same facts and circumstances for each of her first, second and third causes of action. Plaintiff does not assert, in her first cause of action, that she suffered any direct injury as a result of the lack of informed consent that differed from the allegations of veterinary malpractice. Plaintiff also does not assert, in her second cause of action, that the defendants acted in a manner that was intentional wanton or malicious or that differed from her third cause of action for malpractice. Accordingly, those portions of defendants' motion which seeks to dismiss plaintiff's first and second causes of action are granted.

#### Fifth Cause of Action

Plaintiff's fifth cause of action asserts an action for fraud. Plaintiff asserts that, after she informed her credit card company that she disputed the charges for veterinary services rendered by the Medical Center, the individual defendants made fraudulent statements to Chase Visa Merchandise Services in order to secure payment. An action for fraud must assert that the defendants made a false representation, that the defendants intended to defraud the plaintiff with said representation, that the plaintiff reasonably relied on the representation and that the plaintiff was damaged as a result of the reliance (See, *New York University v. Continental Insurance Company*, 87 NY2d 308 [1995]; *Introna v. Huntington Learning Centers, Inc.*, 78 Ad3d 796 [2d Dept. 2010]). However, plaintiff does not allege that the defendants made any false representation to her, that she relied on the representation, nor that she was damaged. Accordingly, plaintiff's fifth cause of action must be dismissed.

#### Sixth Cause of Action

Plaintiff's sixth cause of action seeks punitive damages for the defendants' alleged premeditated, gross, fraudulent and wanton acts of negligence. Plaintiff asserts that the acts of the defendants place "untold numbers of New Yorkers as clients, and their companion animals as patients at risk and is of great concern to the Plaintiff..." Although plaintiff asserts that, as a licenced veterinarian, she has been damaged, both personally and professionally, plaintiff has no standing to assert damages on behalf of "untold numbers of New Yorkers". As this is not a class action where plaintiff has been made a certified class

representative, the instant complaint must only state plaintiff's personal and specific damages suffered as a result of the defendants' negligence. As previously stated, plaintiff may only maintain a cause of action for gross negligence where she asserts that the wrongdoing of the defendants was different than ordinary negligence and that she suffered specific damages as a result thereof (See, *Lubell*, supra). As plaintiff's sixth cause of action lacks the requisite detail, she has failed to state a cause of action for premeditated, gross, fraudulent and wanton acts of negligence. Accordingly, that portion of defendant's motion which seeks dismissal of plaintiff's sixth cause of action is granted.

#### Fourth, Seventh and Eighth Causes of Action

Plaintiff's fourth, seventh and eighth causes of action are for damages resulting from defendants' alleged withholding of medical records, negligent infliction of emotional distress and bystander negligent infliction of emotional distress, respectively. However, it is well-settled that New York does not recognize causes of action for emotional distress caused by the death of a pet (See, *Kyprianides v. Warwick Valley Humane Society*, 59 Ad3d 600 [2d Dept. 2009]; *Feger v. Warwick Animal Shelter*, 29 Ad3d 515 [2d Dept. 2006]; *Jason v. Parks*, 224 Ad2d 494 [2d Dept. 2004]).

Plaintiff has similarly failed to state a cognizable cause of action for the defendants' alleged withholding of medical records. In opposition to the instant motion, plaintiff's counsel states that there was a delay of over one year between the time that plaintiff requested the subject records and when same was disclosed by the defendants. However, neither the complaint, nor plaintiff's opposition to the instant motion reveals that plaintiff sustained any damage as a result of this delay. Additionally, plaintiff fails to supply this court with any legal authority to support such a cause of action. Accordingly, plaintiff's fourth, seventh and eighth causes of action must be dismissed. It is,

**ORDERED**, that plaintiff's first, second, fourth, fifth, sixth, seventh and eighth causes of action are hereby dismissed by this court. The foregoing constitutes the decision, judgment and order of this court.

Dated: September 8, 2011

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**JANICE A. TAYLOR, J.S.C.**

