

Bercarich v Veterinary Med. Ctr. of Long Is., PLLC
2020 NY Slip Op 32245(U)
April 30, 2020
Supreme Court, Suffolk County
Docket Number: 607602/16
Judge: Carmen Victoria St. George
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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

ORIGINAL

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

_____ x

DINA BERCARICH,

**Index No.
607602/16**

Plaintiff,

**Motion Seq:
001 MG
002 MD**

-against-

Decision/Order

**VETERINARY MEDICAL CENTER OF LONG
ISLAND, PLLC,**

Defendant.

_____ x

The following electronically-filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	14-27; 29-32
Answering Papers.....	33-36
Reply.....	38; 39-41
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

In this action commenced to recover damages for veterinary malpractice, the defendant, Veterinary Medical Center of Long Island, PLLC (VMCLI) seeks summary judgment dismissal of the complaint (Motion Sequence 001). The dog's owner, plaintiff Bercarich, opposes VMCLI's motion and the plaintiff cross-moves for summary judgment against VMCLI (Motion Sequence 002).

The essential facts are that the plaintiff noticed that her dog, "Roxie," appeared to be in pain and unable to move her hind legs during the early morning hours of August 19, 2014. Later that same day, at approximately 2:24 p.m. the plaintiff brought Roxie to VMCLI, where the dog was examined by Dr. Mackey an employee of VMCLI. VMCLI is not Roxie's regular veterinarian. Following the examination, the drawing of blood samples and the taking of x-rays, Dr. Mackey advised the plaintiff that the x-ray results were unremarkable, that Roxie should be kept on strict cage rest for two weeks, that three types of prescription medications prescribed for pain and inflammation should be administered to the dog, and that plaintiff should take the dog to her regular veterinarian the next morning.

Roxie remained in much the same physical condition overnight and on August 20, 2014, in the morning, the plaintiff's parents brought the dog to North Shore Animal League (NSAL), which is the medical provider that had been Roxie's regular veterinarian since the dog's adoption years earlier.¹ NSAL did not perform any testing or procedures upon Roxie during that visit, but referred plaintiff's parents to Long Island Veterinary Specialists (LIVS). That same afternoon, plaintiff's parents took Roxie to LIVS. LIVS did not perform an MRI on Roxie on August 20th, nor was surgery performed on the 20th. Roxie was kept overnight on the 20th, and on August 21, an MRI and surgery were performed.

The complaint filed in this action, which has not been amended, alleges a single cause of action for negligence against Dr. Mackey, and since the doctor was an employee of VMCLI, plaintiff is apparently suing the facility on the theory of respondeat superior. Dr. Mackey is not a named defendant in this action. Specifically, the complaint alleges that Dr. Mackey was negligent because she "did not conduct an MRI" (Complaint, ¶ 9). The complaint also alleges that Dr. Mackey "had a duty to use reasonable diligence in examining Roxie and performing all necessary tests..." and that the doctor should have known that an MRI should have been performed. As a result of the alleged failure of Dr. Mackey to properly examine, investigate and confirm Roxie's diagnosis with reasonable care, plaintiff claims that the delay in treatment caused Roxie to suffer further complications, a longer recovery period, impacted her chance of regaining full mobility of her hind legs, and essentially cost plaintiff more money than she should have had to spend.²

Plaintiff's verified Bill of Particulars alleges that the alleged negligence occurred on August 19, 2014, at approximately 2:24 p.m. at VMCLI. Specifically, it is alleged that the defendant "failed to properly diagnose Roxy by conducting a necessary MRI..." by departing from acceptable veterinary protocol in "failing to conduct an MRI," and that as a result of defendant's negligence "in failing to properly diagnose Roxie, treatment was delayed causing further complications." The Bill of Particulars has not been supplemented or amended.

Summary Judgment Standard and Veterinary Malpractice

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party (*Makaj v Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]). "The Supreme Court's function on a motion for summary judgment is issue finding, not issue determination" (*Trio Asbestos Removal Corp. v. Gabriel & Sciacca Certified Public Accountants, LLP*, 164 AD3d 864, 865 [2d Dept 2018]).

"In order to establish a prima facie case of veterinary malpractice, a plaintiff is required to show a deviation or departure from accepted veterinary practice, and that such departure was a proximate cause of the injury" (*Solomon v. Center for Specialized Veterinary Care*, 2015 NY Slip Op 50423 [U])

¹ Plaintiff was not present at North Shore Animal League on August 20, 2014 because she was attending a concert in Connecticut, nor was plaintiff present at LIVS the next day, August 21, 2014.

² The cost of veterinary treatment is the proper measure of damages for an injured animal (*Astarita v. Croton Animal Hospital*, 2016 NY Slip Op 31731 [U] [Civ Ct Westchester County 2016]).

[Sup Ct App Term 2d Dept 2015]). Furthermore, expert testimony is necessary to establish the applicable standard of care, as well as a deviation from such standard, which resulted in injury, unless the case is one within the experience of the average layperson (*Astarita*, supra at 8). This case is not within the experience of the average layperson; accordingly, expert affidavits have been submitted by both parties.

The Defendant's Motion

Defendant submits, *inter alia*, the affidavit of its expert, Richard Joseph, DVM, and Roxie's medical records from VMCLI, NSAL and LIVS. Based upon Dr. Joseph's affidavit, the defendant has established its *prima facie* entitlement to summary judgment as a matter of law with respect to the claims advanced against it in the complaint and Bill of Particulars.

Dr. Joseph explains that the conservative treatment recommended by Dr. Mackey was appropriate and did not deviate from accepted standards of care based upon the physical examination of the dog, blood tests, unremarkable x-rays, and Dr. Mackey's observations that the dog could still ambulate while in the hospital. For these same reasons, Dr. Joseph also opines that there was no delay in Roxie undergoing surgery as a result of VMCLI's care.

Dr. Joseph notes, as does this Court, that when Roxie was brought to non-party LIVS on August 20, 2014, an MRI was not immediately conducted, nor was surgery immediately performed. The MRI and ensuing surgery did not occur until the following day, August 21, 2014. In reviewing Roxie's medical records, Dr. Joseph points out that in those records is a statement by a veterinarian that there is no way to know if doing surgery the day before would have made a difference or not.

This Court has reviewed those records, and in the LIVS records there are two entries, one from March 16, 2015 and one from March 19, 2015 wherein a member of LIVS had conversations with plaintiff's counsel concerning Roxie. LIVS stated that medication is an option for a dog who could still walk. In answer to the question as to whether "the time period would have made a difference. Not necessarily" was LIVS's answer, in addition to the following statement:

"Lots of research has been done stating that the 'golden' period is 24 hours, but from experience and my own study we have seen dogs that have been down longer improve. There are also situations where a walking dog does not walk or does not walk well after sx [surgery] due to an inflammatory process that permanently damages the cord. Those situations could be applied to Roxie as well. There is no way to know if doing sx [surgery] the day before would have made a difference or not."

Thus, it is this Court's determination, based upon Dr. Joseph's expert opinion and the statements of non-party LIVS contained in Roxie's own medical records, that the defendant has established, *prima facie*, that the departure alleged in the complaint and Bill of Particulars cannot be said to be the proximate cause of Roxie's injuries.

The Cross-Motion

At the outset, this Court determines that it will not consider any new or amplified theories of recovery suggested for the first time in opposition to the defendant's motion for summary judgment that were not included in the complaint or Bill of Particulars (*Fox v. Saloon*, 166 AD3d 950, 951 [2d Dept 2018]; *Mezger v. Wyndham Homes, Inc.*, 81 AD3d 795, 796 [2d Dept 2011]). These theories include those discussed and suggested by plaintiff's expert, Anne Pierok, DVM, as follows: 1) defendant should have administered intravenous steroids to Roxie; 2) Dr. Mackey failed to properly interpret the x-rays taken on August 19, 2014; 3) lack of oversight by a supervising veterinarian; 4) failure to express Roxie's bladder allegedly causing paralysis; 5) Roxie should have been hospitalized overnight at VMCLI on August 19, 2014 instead of being released; and 6) Roxie was not classified appropriately.

Concerning the alleged departure consisting of a failure to perform an MRI on Roxie on August 19, 2014, Dr. Pierok's affidavit, which this Court chooses to consider despite defendant's objections thereto, fails to sufficiently address the issue of proximate cause. Accordingly, plaintiff's papers do not raise a triable issue of fact sufficient to defeat defendant's motion, nor do plaintiff's papers establish her *prima facie* entitlement to summary judgment as a matter of law.

Dr. Pierok states that, "the failure to follow up with further testing departed from good and accepted practice. Given what we know about the nature of the ultimate results, earlier intervention would have been *likely* to reduce Roxie's symptoms and sequelae. . ." (emphasis added). Dr. Pierok also states in her affidavit that, "if an MRI exam had been made available at first point of exam, Roxie would have received an expedient diagnosis and emergency surgery that day, or the next, *possibly* reducing the amount of damage done to her spinal cord" (emphasis added). These statements are consistent with the notes in Roxie's LIVS medical records noted by defendant's expert and this Court revealing that it is unknown whether earlier intervention would have made a difference, thereby undermining plaintiff's theory of liability by demonstrating the inability to prove proximate cause. Furthermore, Dr. Pierok apparently ignores the undisputed fact that Roxie did not receive an MRI at LIVS until August 21, 2014; therefore, her statements that Roxie would have and should have received an MRI immediately is also undermined by the actions taken at LIVS.

Based upon the foregoing, the defendant's summary judgment motion is granted and plaintiff's cross-motion for summary judgment against the defendant is denied. The complaint is dismissed, and this action is to be marked disposed. Any relief not specifically addressed is denied.

The foregoing constitutes the Decision and Order of this Court.

Dated: April 30, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE 

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [X] NON-FINAL DISPOSITION []