

Ritter v Bluepearl Operations LLC
2021 NY Slip Op 30341(U)
February 5, 2021
Supreme Court, New York County
Docket Number: 650502/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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MATTHEW RITTER, LOUISE RITTER,
Plaintiff,

- v -

BLUEPEARL OPERATIONS LLC, BLUEPEARL
VETERINARY PARTNERS, LLC, ALEXIS CISTOLA,
AMANDA LAPORTE, ALANA REDFERN, DR. KATHRYN
MERCER, JOHN DOE 1-5

Defendant.

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INDEX NO. 650502/2019

MOTION DATE 01/30/2020,
N/A

MOTION SEQ. NO. 001 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 16, 18, 20, 21, 28

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, both motions are granted in their entirety.

Matthew and Louise Ritter (“Plaintiffs”) were the owners of a cat named Camry. Defendant Bluepearl is a veterinary clinic. Defendants Alexis Cistola, Amanda LaPorte, Alana Redfern, and Dr. Kathryn Mercer are all veterinarians employed by Bluepearl.

Plaintiffs commenced this action alleging that the Defendants breached the appropriate standards of veterinary care in the treatment of their cat. Plaintiffs claim that they brought Camry to Bluepearl on March 20, 2018 to be treated in a “reasonable, competent manner consistent with applicable veterinary community standards.” Instead, Plaintiffs assert that during the period from March 20, 2018 through March 27, 2028, Defendants negligently failed to administer proper veterinary treatment and medication to Camry, failed to make proper observations regarding

Camry's condition, failed to render proper medical attention and deviated from standards of care required of veterinarians and/or veterinary assistants and were otherwise negligent, which led to Camry's death.

Preliminarily, the court will grant motion sequence 003. In that motion, Dr. Mercer ("Mercer") moves to dismiss the amended complaint against her for lack of jurisdiction due to improper service of process. (NYSCEF Doc No. 34.) Notably, the court granted identical relief to Dr. Mercer in its January 30, 2020 order, which decided motion sequence 002. (NYSCEF Doc No. 30.) Plaintiffs then filed the amended complaint against all Defendants, including Dr. Mercer, on the same day. (NYSCEF Doc No. 32.) Plaintiffs have not opposed this motion and still fail to prove that they properly served Mercer.

In motion sequence 001, Defendants Bluepearl, Cistola, LaPorte, and Redfern (hereinafter "Defendants") move to dismiss four of the six causes of action set forth by Plaintiffs: breach of bailment for hire, gross negligence, trespass to chattel, and intentional infliction of emotional distress.¹ The remaining causes of action are for professional malpractice and vicarious liability.

Plaintiffs seek to recover compensatory damages incurred for the treatment of Camry in the sum of \$15,262.22 plus \$10,000.00 for the time and lost wages suffered by the plaintiffs, plus, \$10,000.00 for conscious pain and suffering experienced by Camry, along with \$5,000.00 representing the fair market value of Camry and punitive damages in the amount of \$250,000.00.

Defendants argue that the gravamen of Plaintiffs' claims sound in veterinary malpractice. Defendants assert that Plaintiffs have based their claims for compensation on the premise that

¹ Plaintiffs filed an amended complaint on January 30, 2020, setting forth six of the eight claims contained in the original complaint. Plaintiffs dropped counts 4 and 5 from the original complaint, which both were claims for breach of bailment for hire due to lack of informed consent. The court will review motion sequence 001 as if it relates to the amended complaint.

Camry was not personal property, as defined by New York law, but on the premise that Camry was a human being.

Defendants argue that Plaintiffs' claims that watching the suffering and death of Camry, knowing that it was caused by Defendants, lack a basis in law. Plaintiffs' complaint further alleges that Camry suffered extreme pain and emotional distress at Defendants' hands.

Defendants argue that the First Cause of Action, for breach of bailment for hire, must be dismissed for failure to state a cause of action, in that Plaintiffs do not set forth the required "special promise to effect cure or accomplish some definite result". According to Defendants, this cause of action is duplicative of the professional malpractice cause of action, in that Plaintiffs claim that Defendants failed to provide reasonable care and proper professional treatment and failed to provide proper veterinary services, including the alleged failure to prescribe and administer proper medications to Camry.

Defendants also seek dismissal of the Fourth Cause of Action alleging trespass, arguing that this cause of action is also based upon the same facts and circumstances asserted in the professional malpractice cause of action and is therefore duplicative of that claim.

Plaintiffs oppose the motion to dismiss, acknowledging that New York Courts do not recognize a claim for conscious pain and suffering of an animal in a veterinary malpractice claim and that such claims are not available in causes of action sounding in negligence. However, Plaintiffs argue that the Defendants' conduct in this case constituted a breach of bailment, which is an intentional tort, not a negligence claim, which tort is governed by different rules.

Plaintiffs argue that a breach of bailment is specifically defined by the New York State Legislature as the "causing of unjustifiable physical pain suffering or death". Plaintiffs contend

that the resultant pain, suffering and death of their cat are a measure of damages that the jury may consider in determining the appropriate remedy.

Plaintiffs further assert that Defendants' conduct not only is a breach of bailment but that the conduct also violates the New York State's statutory criminal ban on such conduct, which is sufficiently outrageous, warranting exemplary damages.

Plaintiffs argue that none of their causes of actions are duplicative. Specifically, Plaintiffs allege that the Defendants committed an intentional tort by breaching the bailment agreement, wherein Defendants agreed to provide reasonable, proper, appropriate, and competent veterinary care to Plaintiffs' cat.

Plaintiffs next assert that Defendants committed gross negligence through their reckless behavior when they treated plaintiff's cat and administered over two times the proper medication to Camry without recognizing the risk, which caused their cat to die.

Plaintiffs finally argue that Defendants committed plain negligence or veterinary malpractice when they treated plaintiff's cat in a manner that did not meet the prevailing standards of care, resulting in the death of their cat.

Defendants' motion is granted in its entirety. Specifically, Plaintiff's Sixth Cause of Action for intentional infliction of emotional distress is dismissed because in New York there is no cause of action for emotional distress damages as result of negligent care and treatment rendered to one's animal, which is considered to be property. *Jason v Parks*, 224 AD2d 494 (2d Dept 1996).

The Second Cause of Action gross negligence, which alleged departures from the standard of care in veterinary medicine, is also dismissed. This cause of action is duplicative of the Cause of Action alleging veterinary malpractice and cannot stand. *Gale v Animal Medical Center*, 108 AD3d 497 (2d Dept 2013).

Plaintiffs' First Cause of Action alleging breach of a bailment contract is also duplicative of the cause of action alleging professional malpractice. A cause of action for breach of contract will not be sustained where it is merely a redundant pleading of plaintiff's malpractice claim in another guise as an attempt to plead a contract action which is malpractice. *Abbondando v. Hiltzig*, 282 AD2d 224 (1st Dept 2001).

The Fourth Cause of Action for trespass to chattel by prescribing and administering medications in excess of recommended dosage is also clearly based upon of the same facts and circumstances of the professional malpractice claim. In addition, this Cause of Action cannot stand because Plaintiffs presented Camry to Defendants for care and treatment. The allegation of trespass in the amended complaint refers to the other causes of action alleging lack of informed consent and gross negligence. It has been held that in a malpractice case, where fraud claims were based upon the same allegations as a malpractice claim and sought essentially the same relief, such claims should be considered duplicative of the assertion of malpractice and should be dismissed. *Atton v. Bier*, 12 AD3d 240 (1st Dept 2004).

As Plaintiffs have failed to properly plead the above causes of action in support of their claim, motion sequences 001 and 003 are granted. Thus, it is hereby

ORDERED that Defendants Bluepearl, Cistola, LaPorte, and Redfern's motion sequence 001 is granted, and counts 1, 2, 4, and 6 of the amended complaint are hereby dismissed; and it is further

ORDERED that Defendant Mercer's motion sequence 003 is granted and the amended complaint is dismissed in its entirety as to Mercer.

Any requested relief not expressly addressed by the court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

02/05/2021
DATE


W. FRANC PERRY, 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