

Grayson v Greenberg

2026 NY Slip Op 30507(U)

February 2, 2026

Supreme Court, New York County

Docket Number: Index No. 805292/2020

Judge: Kathy J. King

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHY J. KING **PART** **06**

Justice

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VIOLET ELIZABETH GRAYSON, and VITA VELOCCISMA GRAYSON,

Plaintiffs,

INDEX NO. 805292/2020

MOTION DATE 10/29/2024

MOTION SEQ. NO. 002

- v -

MARC GREENBERG, BLUE PEARL ANIMAL HOSPITAL MIDTOWN N.Y., and BLUE PEARL VETERINARY PARTNERS, LLC, and MARS CORPORATION,

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and oral arguments being heard, Defendants Marc Greenburg (“Dr. Greenberg”), Blue Pearl Animal Hospital Midtown N.Y. (“Blue Pearl”), and Blue Pearl Veterinary Partners, LLC, and Mars Corporation (collectively, “Defendants”) move for an Order (1) granting summary judgment on behalf of Defendants pursuant to CPLR 3212 as to Plaintiff’s claim for veterinary malpractice; (2) dismissing Plaintiff’s claim for breach of contract and breach of warranty pursuant to CPLR 3211(a)(7); (3) dismissing Plaintiff’s claim of failure to obtain informed consent; (4) dismissing Plaintiff’s claim for res ipsa loquitur; and (5) dismissing Plaintiff’s Complaint in its entirety.

Plaintiff Violet Grayson (“Plaintiff”), individually and on behalf of Vita Grayson (“Vita”) opposes the motion.

BACKGROUND

Plaintiff is the owner and caretaker of Vita, a Whippet dog, who participated in lure course racing. On March 26, 2018, Vita suffered an injury to the right paw during a lure course run. On March 31, 2018, Plaintiff brought Vita to Gotham Veterinary Center, where an examination led to a recommendation that Plaintiff take her to Defendant Blue Pearl. Subsequently, the Plaintiff brought Vita to Blue Pearl that same day, where she was seen by Defendant Dr. Greenberg. After evaluating Vita under sedation, Dr. Greenberg recommended amputation of the injured toe, which was performed on March 31, 2018, by Dr. Greenberg. The procedure included an incision around the right four metacarpophalangeal joint and then the joint was disarticulated. Plaintiff took Vita home that same day and returned with Vita on April 2, 2018, for a follow-up for the removal of stitches. On June 7, 2018, Plaintiff presented Vita to Dr. Greenberg with lameness and foot collapse adjacent to the location of the amputation. Dr. Greenberg examined Vita and recommended Plaintiff seek orthopedic rehabilitation.

Subsequently, the instant action was commenced by a filing of a Summons and Complaint on September 5, 2020, in which Plaintiff alleges veterinary malpractice, lack of informed consent, and breach of contract and breach of warranty, and invokes the doctrine of *res ipsa loquitur*. Plaintiff alleges that Dr. Greenberg's contraindicated amputation of Vita's injured toe caused the structural collapse of Vita's right front foot.

As a threshold matter, the Court grants that branch of the Defendants' motion for summary judgment as to the Plaintiff's veterinary malpractice cause of action, upon the Plaintiff's withdrawal of the cause of action (*see Gobind v Nercessian*, 227 ADsd 464 [1st Dept 2024]).¹

¹ Plaintiff withdrew the cause of action for veterinary malpractice, as set forth in paragraph 57 of NYSCEF Doc. No. 54.

Accordingly, the motion for summary judgment is granted to the extent that Plaintiff's claim for veterinary malpractice is dismissed.

LACK OF INFORMED CONSENT

A defendant moving for summary judgment on a lack of informed consent claim must demonstrate that the plaintiff was informed of the alternatives to and the reasonably foreseeable risks and benefits of the treatment (*Henry v Bezalel Rehabilitation & Nursing Ctr.*, 2020 NY Slip Op30369(U) [Sup Ct, NY County 2020]; *Koi Hou Chan v Yeung*, 66 AD3d 642, 643 [2d Dept 2009]. A defendant may satisfy his or her burden of demonstrating a prima facie entitlement to judgment as a matter of law in connection with such a cause of action where a patient signs a consent form indicating his or her understanding of the possible risks of the procedure along with corroborating medical records (*see Bamberg-Taylor v Strauch*, 192 AD3d 401, 401-402 [1st Dept 2021]).

In support of their motion, Defendants' expert, Veterinarian Sarah R. Dowling, DVM, ("Dr. Downing") opines that Dr. Greenberg acted in strict accordance with the veterinary standard of care regarding informed consent and the subsequent surgical treatment. According to Dr. Downing, the standard of care only requires a veterinarian to disclose risks that are generally accepted and inherent to a procedure. Because a "foot collapse" is not a recognized or typical risk of a digit amputation, Dr. Downing asserts that Dr. Greenberg was under no obligation to include it in the informed consent discussion. According to Dr. Downing's review of the records, the records and testimony confirm that Dr. Greenberg appropriately advised the Plaintiff of the actual risks and benefits associated with the surgery, thereby satisfying his professional obligations.

The Court finds that the Defendants demonstrate their prima facie burden for summary judgment as to the Plaintiff's lack of informed consent cause of action (*Koi Hou Chan v Yeung*, 66 AD3d at 643).

In opposition, Plaintiff fails to proffer expert testimony sufficient to rebut Defendants' prima facie showing. Specifically, Plaintiff offers no expert affirmation to establish the applicable standard of care or to demonstrate how Defendants' actions regarding informed consent deviated from that standard and caused the injuries being alleged. It is well-settled that where a defendant has established prima facie entitlement to summary judgment, a plaintiff's failure to submit a competent expert affirmation in opposition is fatal to the action (*see Mattis v Keen, Zhao*, 54 AD3d 610 [1st Dept 2008]; *see generally Fleming v Pedinol Pharmacal, Inc.*, 70 AD3d 422, 893 NYS2d 551 [1st Dept 2010]).

Accordingly, the branch of Defendants' motion for summary judgment seeking dismissal of the cause of action for lack of informed consent is granted, and that claim is hereby dismissed.

BREACH OF CONTRACT AND WARRANTY

On a motion pursuant to CPLR 3211[a][7] to dismiss for failure to state a cause of action, the Court must determine only whether the facts as alleged fit within any cognizable legal theory (*Murphy v Department of Educ. of City of N.Y.*, 155 AD3d 637, 638 [2nd Dept 2017]). It is well settled that where a cause of action lies in medical or veterinary malpractice, a breach of contract action is legally redundant, and may not be pursued unless Plaintiff can prove that, within the context of medical treatment, defendant expressed a specific promise to effect a cure or to accomplish some definite result (*Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005], *citing Winegrad v Jacobs*, 171 AD2d 525 [1991], *lv dismissed* 78 NY2d 952 [1991]).

In support of their motion, and by way of their expert, Dr. Downing, Defendants contend that Plaintiff's breach of contract and warranty claim arises from the same facts and circumstances as the negligence/veterinary malpractice claim and is therefore duplicative and cannot be sustained. Defendants deny Plaintiff's claim that Dr. Greenberg verbally promised that Vita would recover and return to her normal activities one month after the amputation. Further, the Defendants highlight that the Plaintiff's Complaint as to the cause of action for breach of contract and warranty does not allege that Dr. Greenberg failed to provide the agreed-upon treatment of Vita, but rather that the care provided did not fall within the acceptable standard of care.

In opposition, Plaintiff contends that Dr. Greenberg breached a specific promise and warranty by assuring that Vita would return to lure coursing within weeks of her toe amputation. However, Plaintiff offers no evidence that the Defendants promised a cure or a definite result. It is well settled that a plaintiff's opposition to a prima facie showing must be supported by an expert affidavit to establish a departure from accepted standards of care, as lay testimony is insufficient to raise a triable issue of fact (*see Winegrad v Jacobs*, 171 AD2d 525, 567 [1st Dept 1991]; *see Mitchell v Spataro*, 89 AD2d 599 [2d Dept 1982]; *see also Delaney v Krafft*, 98 AD2d 128 [3d Dept 1984]).

Accordingly, the breach of contract and breach of warranty causes of action are dismissed, as that branch of Defendants' motion seeking dismissal as to those claims is granted.

RES EPSA LOQUITUR

The doctrine of res ipsa loquitur is available only in limited circumstances where the "actual or specific cause of an accident is unknown" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). To invoke the doctrine, a plaintiff must establish three elements: (1) the event must be of a kind which ordinarily does not occur in the absence of negligence; (2) it must be caused by

an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (*id.*; *see also Petro v New York Life Ins. Co.*, 277 AD2d 213, 214 [2d Dept 2000]). The doctrine is generally restricted to factually simple occurrences that require no expert testimony for a jury to reasonably conclude that the accident would not have happened without negligence (*see States v Lourdes Hosp.*, 100 NY2d 208, 210 [2003]). Central to this analysis is the “exclusive control” requirement, which serves to eliminate all explanations for the injury other than the defendant’s negligence (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227 [1986]).

In support of their motion, Defendants submit the affirmation of Dr. Downing, who opines that the amputation was performed correctly and in accordance with accepted standards of veterinary care. Dr. Downing specifically rejects Plaintiff’s allegation of surgical impropriety, attributing any subsequent complications to Plaintiff’s one-week delay in seeking treatment. This delay, according to the expert, allowed an infection to progress and caused latent tendon damage that was not visible during the initial presentation or the surgical procedure itself.

Based on this expert evidence, Defendants contend that the doctrine of *res ipsa loquitur* is inapplicable as a matter of law. First, Defendants assert that Plaintiff has failed to establish that a ‘foot collapse’ is an event that ordinarily does not occur in the absence of negligence. Second, Defendants argue that the ‘exclusive control’ and ‘voluntary contribution’ prongs of the doctrine are unsatisfied, as the record—including Plaintiff’s own testimony—indicates that the animal was permitted to run uncontrolled and sustained further trauma while under Plaintiff’s care following the amputation.

In opposition, Plaintiff argues that the doctrine of *res ipsa loquitur* applies, asserting that the animal’s foot collapse is an event that would not ordinarily occur in the absence of negligence.

Plaintiff contends that because Dr. Greenberg recommended and performed the amputation, he maintained exclusive control over the instrumentality of the injury. Plaintiff further maintains that there is no plausible explanation for the collapse other than Defendants' alleged surgical negligence. Finally, Plaintiff argues that Dr. Greenberg remains solely responsible for the outcome of the procedure, notwithstanding the fact that the animal was no longer under his immediate clinical care at the time the foot collapse occurred.

The Court finds that Plaintiff has failed to establish the applicability of the doctrine of *res ipsa loquitur*. While a plaintiff is not required to eliminate every potential cause of an injury, they must demonstrate that the likelihood of other causes is sufficiently remote such that the 'greater probability' of negligence rests with the defendant (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227 [1986]). Here, Plaintiff has failed to meet this burden, particularly regarding the requirement that the injury must not have been due to any voluntary action or contribution on the part of the plaintiff.

Therefore, the branch of Defendants' motion seeking summary judgment is granted as it relates to Plaintiff invoking the doctrine of *res ipsa loquitur*, and any arguments based thereon are dismissed as a matter of law.

Accordingly, it is hereby

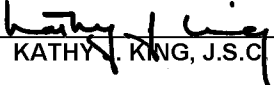
ORDERED the Defendants' motion for summary judgment as to Plaintiff's entire Complaint is granted and all claims against Defendants Marc Greenburg, Blue Pearl Animal Hospital Midtown N.Y., and Blue Pearl Veterinary Partners, LLC, and Mars Corporation are dismissed; and it is further

ORDERED that, within twenty (20) days of the date of this Order, the Defendants are directed to serve a copy of this Order with Notice of Entry upon the Plaintiff; and it is further

ORDERED that, within twenty (20) days of the date of this Order, Defendant NP Sinon shall serve a copy of this Order upon the County Clerk and the Clerk of the General Clerk’s Office, which shall be effectuated in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the “E-Filing” page on the court’s website; and it is further

ORDERED that the Clerk is directed to enter judgment in accordance with this Order.

This constitutes the decision and order of the Court.

<u>2/2/2026</u> DATE					 KATHY J. KING, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE