

**Corkery v Lenox Hill Veterinarians**

2024 NY Slip Op 32252(U)

July 5, 2024

Supreme Court, New York County

Docket Number: Index No. 151239/2024

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. PAUL A. GOETZ PART 47**

*Justice*

-----X

KATHRYN N. CORKERY,

Plaintiff,

- v -

LENOX HILL VETERINARIANS, LAWRENCE ALLEN  
PUTTER, MANUEL RODOLFO SANCHEZ

Defendants.

-----X

INDEX NO. 151239/2024

MOTION DATE 03/14/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

were read on this motion to/for DISMISS.

Prior to serving an answer in this veterinary malpractice action defendants, Lenox Hill Veterinarians, Lawrence Allen Putter, and Manuel Rodolfo Sanchez, move pursuant to CPLR § 3211(a)(7) to dismiss plaintiff’s fourth and fifth causes of action on the ground that such causes of action fail to state a cause of action upon which relief can be sought.

**BACKGROUND**

Defendants Lawrence Allen Putter and Manuel Rodolfo Sanchez are veterinarian doctors who practiced at co-defendant, Lenox Hill Veterinarians located at 1504 2nd Avenue, New York, New York 10075 (NYSCEF Doc No 1 ¶ 2 – 5). According to plaintiff’s complaint defendants performed three oral surgical procedures to remove teeth from her dog Oliver, between August 2022 and May 2023 (*id.* at ¶ 7). Plaintiff alleges that defendants failed to minimize the risk that the multiple procedures would have on Oliver and instead should have extracted all three teeth at once since Oliver was a senior dog and had negative side effects from the anesthesia and suffered from bacteria infections stemming from the surgery (*id.* at ¶ 8). Plaintiff also alleges that

defendants failed to perform a pre-surgical examination which would have revealed that Oliver was at risk for kidney failure resulting from surgery (*id.* at ¶ 9 – 10). On July 16, 2023 Oliver died from kidney failure, which plaintiff alleges could have been avoided had defendants taken the proper precautions prior to surgery (*id.* at ¶ 11).

Plaintiff asserts the following five causes of action against defendants: 1) Veterinary Malpractice; 2) Lack of Informed Consent; 3) Negligence; 4) Intentional Infliction of Emotional Distress; and 5) Negligent Infliction of Emotional Distress.

### **DISCUSSION**

#### *Failure to State a Claim*

When reviewing a “motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), [courts] must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every reasonable inference, and determine only whether the facts, as alleged fit within any cognizable legal theory” (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 85-86 [1<sup>st</sup> Dept 2024] [internal quotations omitted]). “In making this determination, we are not authorized to assess the merits of the complaint or any of its factual allegations” (*id.* at 86 [internal quotations omitted]). Further “[i]n assessing a motion under CPLR 3211(a)(7), ... the criterion is whether the proponent of the pleading has a cause of action, not whether [they have] stated one” (*Eccles v Shamrock Capital Advisors, LLC*, 2024 NY Slip Op 02841 [Ct App May 23, 2024] [internal quotations omitted]).

Defendants argue that the fourth and fifth causes of action for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress must be dismissed because under New York law a pet is considered personal property and the New York courts do not recognize emotional distress based upon harm suffered by personal property. Plaintiff opposes

and argues that there has been a recent shift in both New York legislation and common law suggesting that pets should not be treated as property or an asset, but rather courts should consider the emotional bond that people have with companion animals as akin to familial relationships, thus allowing for recovery based on emotional damages that one suffers when the animal is intentionally or negligently harmed.

*Negligent Infliction of Emotional Distress*

“[W]hen there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred” (*Taggart v Costabile*, 131 AD3d 243, 252 [2<sup>nd</sup> Dept 2015]). “A breach of the duty of care resulting directly in emotional harm is compensable even though no physical injury occurred when the mental injury is a direct, rather than a consequential, result of the breach” (*Ornstein v New York City Health and Hosps. Corp.*, 10 NY3d 1, 6 [2008] [internal quotation marks omitted]). The claim must also “possess some guarantee of genuineness” of the emotional harm (*Taggart v Costabile*, 131 AD3d 243, 256 [2<sup>nd</sup> Dept 2015]). “Plaintiffs’ psychological traumas [must be] readily and unquestionably understandable, evidencing an especial likelihood of genuine and serious mental distress, arising from the special circumstances” (*Brown v New York Design Ctr., Inc.*, 215 AD3d 1, 6 [1<sup>st</sup> Dept 2023]). Following this requirement of a guarantee of genuineness, “[a] cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him which unreasonably endangered his physical safety, or caused him to fear for his own safety” (*Sacino v Warwick Val. Cent. School Dist.*, 138 AD3d 717, 719 [2<sup>nd</sup> Dept 2016]).

Courts also recognize “compensable emotional harm caused by the negligent infliction of injuries upon another person in certain cases” (*Greene v Esplanade Venture Partnership*, 36

NY3d 513, 522 [2021]). The “zone of danger rule ... allows one who is ... threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress flowing only from the viewing [of] the death or serious physical injury of a member of his or her immediate family” (*id.* [internal quotation marks omitted]; see also *Battistello v E. 51st St. Dev. Co., LLC*, 24 Misc 3d 858, 864 [SC NY Co 2009] [“In order to recover under a ‘Zone of Danger’ theory, a plaintiff must establish that he suffered serious emotional distress that was proximately caused by the observation of a family member's death or serious injury while in the zone of danger”]). The logic behind this exception is that there is a “guarantee of genuineness” of emotional trauma that would flow from directly witnessing a serious injury suffered by a family member. While courts have “not established an outer boundary for ‘the immediate family’ element of the zone of danger rule”, in *Greene* the court recognized the “special status” between grandparent and grandchild and allowed for a theory of recovery based on that relationship (*id.* at 525 – 526).

Traditionally, “pets are treated under New York law as personal property, and the loss of a dog by reason of negligence will not support claims by the animal's owners to recover for their resulting emotional injury” (*Schrage v Hatzlacha Cab Corp.*, 13 AD3d 150 [1<sup>st</sup> Dept 2004]). “[D]amages may not be recovered for emotional distress caused by ... negligent harm to personal property” (*Biondo v Linden Hill United Methodist Cemetery Corp.*, 280 AD2d 570, 571 [2<sup>nd</sup> Dept 2001] As such traditionally, “New York law does not recognize a claim for negligent infliction of emotional distress for the loss of animals” (*Kyprianides v Warwick Val. Humane Soc.*, 59 AD3d 600, 601 [2<sup>nd</sup> Dept 2009]).

However, there is a growing body of law which recognizes that “[c]ompanion animals are a special category of property and are afforded many protections under the law” (*Feger v*

*Warwick Animal Shelter*, 59 AD3d 68, 71 [2<sup>nd</sup> Dept 2008]; *M & M Env'tl. v Myrick*, 2020 NY Slip Op 34028(U) \*\*6 [SC NY Co 2020] [denying request for an order of turnover and recovery and an order of seizure of a bedbug sniffing dog to the company that purchased and trained her in light of the “special category of property” that dogs are in). Plaintiff argues that recent legislation also shows that New York is shifting away from the notion that pets are considered personal property. They note that when determining equitable distribution of property in divorce actions, Domestic Relations Law § 236[b][5][d][15] states that “in awarding the possession of a companion animal, the court shall consider the best interest of such animal.” When the New York Legislature adopted this subparagraph of Domestic Relations Law § 236 the Justification of the bill stated, “As many of these households know, companion animals usually become members of the family” (Senate Bill S4248).

However, assuming that a dog falls within a “special category of property” that warrants equating the dog with a person to allow recovery for emotional damages suffered by a plaintiff caused by the negligent infliction of injuries on that pet, recovery would be dependent on the rule explained in *Greene*. Plaintiff would have had to have been within the “zone of danger” and directly witness the injuries suffered by Oliver. Since the alleged injuries suffered by plaintiff’s dog stemmed from complications following surgeries, even assuming *arguendo* that a dog could be considered an “immediate family” member, recovery under a negligent infliction of emotional distress claim does not lie here because the complaint does not allege that plaintiff was present during any of Oliver’s surgeries. Nor does the complaint allege that plaintiff herself was “threatened with bodily harm” as a consequence of defendants’ negligence.

Accordingly, plaintiff’s negligent infliction of emotional distress claim will be dismissed.

*Intentional Infliction of Emotional Distress*

“[T]he elements of a claim for intentional infliction of emotional distress are (i) extreme and outrageous conduct, (ii) an intent to cause—or disregard of a substantial probability of causing—severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress” (*Lau v S & M Enterprises*, 72 AD3d 497, 498 [1<sup>st</sup> Dept 2010]). “[A] cause of action for intentional infliction of emotional distress must allege conduct that is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1<sup>st</sup> Dept 2004]).

Defendants argue that the intentional infliction of emotional distress claim must be dismissed for the same reasons as the negligent infliction of emotional distress claim, mainly that a plaintiff cannot recover for emotional damages suffered as a result of injuries suffered by a pet. However, a cause of action for the intentional infliction of emotional distress may be premised upon an act harming an animal if the act was extreme and outrageous and intended to cause severe emotional distress (See *Kyprianides*, 59 AD3d at 601 [analyzing whether euthanizing animals was “sufficiently outrageous and egregious to support a claim for the intentional infliction of emotional distress”]). Unlike a claim for negligent infliction of emotional distress, the key element of an intentional infliction of emotional distress claim is whether the alleged conduct was so outrageous that it “go[es] beyond all possible bounds of decency” (*164 Mulberry*, 4 AD3d at 56).

Here, however defendants’ alleged conduct of extracting teeth from Oliver on three separate occasions cannot support an intentional infliction of emotional distress claim since defendants were veterinarians performing a medical procedures on plaintiff’s dog. Accepting the

facts as alleged in the complaint as true, defendants conduct was not sufficiently outrageous and egregious to support a claim for the intentional infliction of emotional distress. Accordingly, plaintiff’s intentional infliction of emotional distress will be dismissed.

Based on the foregoing, it is

ORDERED that the motion to dismiss is granted and plaintiff’s fourth, and fifth causes of are dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

  
20240705142918PGOETZ11089B7E23B1E74506AB29866A8EC415D1

7/5/2024  
DATE

\_\_\_\_\_  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE