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RATUSCH v. ATTAS

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Civil Court, City of New York,

**Claire RATUSCH, Plaintiff, v. Dr. Amy ATTAS d/b/a Center for
Veterinary Care, Defendant.**

Decided: March 26, 2004

Glen P. McNamee, Mineola, for defendant. Martin S. Streit, New York City, for plaintiff.

On February 4, 2004, plaintiff Claire Ratusch commenced this Small Claims action against veterinarian Dr. Amy Attas d/b/a Center for Veterinary Care alleging “breach of warranty”¹ arising from defendant's spaying of her Maltese dog on May 7, 1997. Plaintiff alleges defendant left a gauze sponge² inside of her dog which was first discovered on April 22, 2003, following a subsequent procedure by another veterinarian.

Defendant now moves for summary judgment dismissing plaintiff's notice of claim and summons on the ground that the action is time-barred pursuant to CPLR § 214(6)'s three year statute of limitations. In opposition and during oral argument, plaintiff's counsel maintains that this action is governed by statutes applicable to “medical malpractice” actions, to allow plaintiff to avail herself of the benefit of the one year “discovery” rule exception contained in CPLR § 214-a to render it timely filed.

A determination of the applicable statute of limitations involves a review of the essence of plaintiff's claim rather than her characterization of her theory of liability (Sears, Roebuck, *supra* at 395, 401 N.Y.S.2d 767, 372 N.E.2d

555). Here, the gravamen of plaintiff's action is that defendant engaged in veterinary professional malpractice which resulted in damage to her property, a Maltese dog. Thus, at first glance, plaintiff's action is governed by the three-year statute of limitations contained in CPLR § 214(6). Indeed, a veterinarian is a member of a learned profession (Educ. Law § 6701) and thus capable of committing professional malpractice (see, *Matter of Restrepo v. State*, 146 Misc.2d 349, 550 N.Y.S.2d 536 [Ct. Cl. 1989]; see also, *Santiago v. 1370 Broadway Associates, L.P.*, 264 A.D.2d 624, 695 N.Y.S.2d 326 [1st Dept. 1999]). Since an action for property damage as well as professional malpractice, other than medical, dental or podiatric malpractice, accrues on the date of the injury (see, *Gaidon v. Guardian Life Ins.*, 96 N.Y.2d 201, 727 N.Y.S.2d 30, 750 N.E.2d 1078 [2001]), plaintiff's action was presumptively time-barred on May 7, 2000.

To avoid this result, plaintiff likens veterinarian's services to those of a "physician" for purposes of taking advantage of the one-year discovery rule pertaining to "foreign objects" left inside a patient (see, CPLR § 214-a).³ Research has failed to find any reported case law or legislative history to offer support for the proposition that the State Legislature intended to include veterinary practice within the phrase "medical" contained in CPLR §§ 214(6) or 214-a. Those statutes relate to the rendition of medical treatment by a licensed physician (*Bleiler v. Bodnar*, 65 N.Y.2d 65, 72, 489 N.Y.S.2d 885, 479 N.E.2d 230 [1985]; *Karasek v. LaJoie*, 92 N.Y.2d 171, 677 N.Y.S.2d 265, 699 N.E.2d 889 [1998]).

In 1975, as part of a comprehensive plan to address the growing malpractice crisis affecting medical providers, specifically physicians and hospitals (*Bleiler*, supra at 68-69, 489 N.Y.S.2d 885, 479 N.E.2d 230; *Karasek*, supra at 174-75, 677 N.Y.S.2d 265, 699 N.E.2d 889), which are in the field of providing medical services to human beings (Educ. Law § 6521), the Legislature, inter alia, reduced the statute of limitations for "medical malpractice" actions from 3 years to 2 1/2 years (CPLR § 214-a). Thereafter, the Legislature amended the above noted statutes on two separate occasions to include dentists and podiatrists (L. 1985 ch. 760, § 3; L. 1986, ch. 485, § 3), professions similarly licensed to treat human beings only (see, Educ. Laws §§ 6601, 7001). Recently, the Court of Appeals in *Karasek*, supra, relied heavily on those legislative factors in declining to extend the class of health care professionals who came within the framework of "medical", to combat the unreasonable increases in malpractice insurance rates for purposes of the statute of limitations, to psychologists. The Court of Appeals opined

that had the Legislature intended to add psychologists to CPLR § 214-a, it could have easily done so when it exercised the opportunity to amend the statute (Id. at 176-177, 677 N.Y.S.2d 265, 699 N.E.2d 889).

Since the scientific field of veterinary care is limited to every living creature except a human being (Educ. Law § 6701), it cannot be judicially determined that such services are “medical” within the meaning and legislative intent of CPLR § 214(6) or CPLR § 214-a. Consequently, defendant's motion for summary judgment dismissing plaintiff's action is granted. The Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of this Court.

FOOTNOTES

1. A cause of action alleging “breach of warranty” for services rendered against a professional is not cognizable in New York State (see, *Sears, Roebuck & Co. v. Enco Assoc.*, 83 Misc.2d 552, 557, 370 N.Y.S.2d 338 [Sup. Ct. Westchester Co. 1975], *affd.* 54 A.D.2d 13, 16, 385 N.Y.S.2d 613 [2nd Dept. 1976], *mod.* 43 N.Y.2d 389, 401 N.Y.S.2d 767, 372 N.E.2d 555 [1977]).
2. Defendant's motion contains an unsworn report, dated 5/7/03, by Lori Ludwig, V.M.D., who performed the April 22nd procedure on plaintiff's dog, and determined that the mass removed, consistent with a “suture or gauze”, was likely attributable to the 1997 spaying (Exh. C).
3. Pursuant to CPLR § 214-a, a medical malpractice based upon a “foreign” object in the body of a patient may be commenced within one year of the “discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier”. This Court notes that a suture is not a “foreign object” (see, *LaBarbera v. N.Y. Eye & Ear*, 91 N.Y.2d 207, 668 N.Y.S.2d 546, 691 N.E.2d 617 [1998]). A gauze may be deemed a “foreign object” depending on whether it was left negligently, or intentionally (see, *Delaney v. Champlain Valley Physicians Hosp. Med. Ctr.*, 232 A.D.2d 840, 648 N.Y.S.2d 761 [3rd Dept. 1996]).

JOSE A. PADILLA, JR., J.

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