260.40 #1

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT DEPT.
C.A. 18159

AUGUST V. MEDEIROS, et al. v. DONALD LLOYD, D.V.M.	MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. FACTS

After receiving a written Complaint from the plaintiffs concerning Dr. Donald Lloyd's alleged improper veterinary treatment of their dog, Pooch, the Board of Registration in Veterinary Medicine (the Board) held an adjudicatory hearing, pursuant to G.L. c.112 sec. 59, 61 and c.30A sec. 10, 11, on December 8, 1983, to determine whether to suspend or revoke Dr. Donald Lloyd's license to practice veterinary medicine in the Commonwealth (The Notice of Decision is attached as Exhibit #1).

The Board found that Dr. Lloyd's treatment of Pooch constituted "negligence and malpractice," id. at 3, and ordered a ninety day suspension of Dr. Lloyd's license, imposition of which was to be waived provided that Dr. Lloyd enroll in a thirty hour internal medicine course that included instruction accepted heartworm therapy, id. Dr. Lloyd did not appeal this decision.

The plaintiffs filed this instant lawsuit. In Count 1, they alleged that Dr. Lloyd's treatment of Pooch was negligent. In Count 6, they alleged that Dr. Lloyd had violated G.L. c.93A.

II. ARGUMENT

The plaintiffs are entitled to summary judgment on the issue of defendant's liability on Count 1, and to an order of this Court that the fact of defendant's negligence is established as to all other counts, by the decision of the Board of Registration in Veterinary Medicine.

To be entitled to summary judgment, the moving party must show that there is no real issue of fact. Hub Associates Inc. v. Goode, 357 Mass. 449, 258 N.E. 2d 733 (1970). A record of proceedings before an administrative body can support a motion for summary judgment. Olde Towne Liquor Store, Inc. v. Alcoholic Beverage Control of Comm., 372 Mass. 152, 153 360 N.E. 2d 1057, 1060 (1977). Issue preclusion or res rejudicata is appropriately raised on a motion for summary judgment. In re Koziol, 18 B.R. 1014 (D. Mass. 1982). See also 95 ALR 2d 648.

The necessary elements of issue preclusion are "identity of course of action and issues, the same parties, and judgment on the merits by a court of competent jurisdiction." Franklin v. North Weymouth Coop. Bank, 283 Mass. 275, 280, 186 N.E. 641, 643

(1933). Even if the causes of action are not identical, the decision of a tribunal is conclusive as to previously litigated issues essential to the decision if the remaining elements are satisfied. Almeida v. Travelers Ins. Co., 383 Mass. 226, 230, 418 N.E. 2d. 602, 605 (1981) citing Restatement of Judgments sec. 68 (1942).

In the case at bar, the Board, acting on the Medeiros' complaint, found that Dr. Lloyd's treatment of Pooch for heartworm constituted "malpractice and negligence," Notice of Decision at 1,3. The parties to the complaints before the Board and the Court are the same and is the same issue, negligence/malpractice. The Board decision was a judgment on the merits.

The Board was a court of competent jurisdiction as to the issue of Dr. Lloyd's negligence. Where jurisdiction over a subject is delegated to a tribunal and its exercise is confided to its discretion, the facts necessarily established by decisions lawfully made pursuant to that authority are binding and conclusive. Almeida, supra, Mass. at 230, N.E. 2d at 605.

The Board, like all Boards of Registration, is empowered to revoke or suspend a practitioner's license for malpractice. G.L. c.112 sec. 61. Dr. Lloyd's license was suspended because the Board found that his action in treating Pooch constituted "negligence and malpractice." Notice of Decision at 3. This finding

of negligence is a fact not only necessarily established by the Board's decision, but one explicitly made by the Board in its role as a finder of fact. It is therefore entitled to issue preclusion effect.

In Almeida, supra, Mass. at 230, N.E. 2d at 605, the Supreme Judicial Court held that the Board of Appeals on Motor Vehicle Liability Policies and Bonds was a court of competent jurisdiction for issue preclusion purposes. A major reason for this holding was that the Board's decision was required to be upheld if a Court found substantial supporting evidence and no other violation of G.L. c.30A, sec. 14. The standard of review for the Board of Registration in Veterinary Medicine is also the substantial evidence standard of G.L. c.30 sec. 14. See G.L. c.112 sec. 64. Thus the Board of Registration in Veterinary Medicine is also a court of competent jurisdiction and its decisions are also entitled to issue preclusion effect.

Dr. Lloyd could have avoided the preclusive effect of the Board decision only had he appealed. Director of Division of Employment Security v. Mattepoisett, 392 Mass. 858, 467 N.E. 2d 1363 (1984). However Dr. Lloyd did not.

The establishment of defendant's negligence would leave no issue of fact as to Count 1 of plaintiff's complaint, except as to the amount of damages. Therefore, this Court should issue judgment for the

plaintiffs on the question of defendant's liability, under Count 1, upon a showing that defendants' negligence has been established under the doctrine of res judicata or issue preclusion. Similarly, upon such a showing, this Court should issue an order that the fact of defendant's negligence has been established as to all other counts.

Dated:

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