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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

LAURA SKARULIS,

Plaintiff(s),

-against-

ANNETTE M. BAGGOTT, M.D., PAUL LUI, M.D., EDMUND F. TOMLINSON, JR., M.D., CAROLYN J. OH, M.D., ZACHARY LEVOKOVE, M.D., SOUTH NASSAU COMMUNITIES HOSPITAL and HORIZON WOMEN'S MEDICAL CARE, P.C.,

Defendant(s).

x

Index No. 600989/08

Motion Submitted: 1/4/12
Motion Sequence: 002, 004

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....
Reply.....XX

Defendants Edmund F. Tomlinson, Jr. M.D., and Zachary Levokove, M.D., move for an Order of this Court, pursuant to CPLR §3212, granting Summary Judgment dismissing the complaint of plaintiff.

Plaintiff cross moves for an Order of this court, if summary judgment is granted to the moving defendants, precluding the remaining defendants from obtaining or deeming them as forfeiting the limited liability benefits of CPLR §16 concerning the acts and omissions of the moving defendants.

Plaintiff commenced this medical malpractice action in May 2008. The plaintiff, age 28 and pregnant at all relevant times referred to herein, alleges, *inter alia*, that the defendants ignored her history of high risk pregnancy/incompetent cervix, and pre-eclampsia condition,

and such failure caused uterine atony, resulting in severe postpartum hemorrhage, and a total abdominal hysterectomy with the removal of her cervix. The defendant physicians are alleged to have departed from the accepted standard of obstetrical practice. The Bill of Particulars cites that the alleged acts and/or omissions occurred between June 1, 2006 and continued through August 1, 2006.

Plaintiff presented at Horizon Women's Medical Care, P.C. ("Horizon") in Rockville Centre, New York, as an obstetric patient in January, 2006 where she was treated by Dr. Tomlinson. He and co-defendant Dr. Baggott were shareholders in Horizon. Plaintiff's prenatal course was eventful in that she suffered from complications that impacted her pregnancy and ultimate delivery of her baby. Such conditions included pregnancy induced hypertension, and an incompetent cervix. She was hospitalized from February to May, 2006, Dr. Tomlinson inserted a cerclage to treat the plaintiff's incompetent cervix, and ordered that she remain in the hospital on bed rest. She was discharged on May 6, 2006.

On June 1, 2006, Dr. Tomlinson admitted the plaintiff to South Nassau Community Hospital in Oceanside, NY, where he was the associate chair of the Department of Obstetrics. As plaintiff was ready for delivery, Dr. Tomlinson admitted her for purposes of removing the cerclage, treating pre-eclampsia, and inducing labor. He ordered a medication regiment and then transferred her care to Dr. Dean, who covered for the Horizon group. The medication was administered to the plaintiff and Dr. Dean artificially punctured the membrane to facilitate the delivery of the baby as plaintiff had dilated. The following morning, at about 7:30 a.m., plaintiff experienced an arrest of descent although she was fully dilated. At 8:30 a.m., her care was turned over to Dr. Baggott. As plaintiff was still in arrest of descent, Dr. Baggott ordered a cesarean section and she was assisted by Dr. Levokove, an in-house attending physician.

Plaintiff's baby was born at 11:01 a.m. and the surgery was completed at 11:42 a.m. The uterine exhaustion, uterine atony and failure of uterus to contract resulted in massive vaginal postpartum hemorrhaging. The plaintiff was returned to the operating room for a supracervical hysterectomy after she developed disseminated intravascular coagulation. Co-defendant, Dr. Lui, performed this surgery with the assistance of Dr. Tomlinson.

Plaintiff claims permanent injuries as result of the defendants' actions.

The plaintiff argues that the defendants have failed to meet their burden establishing an entitlement to summary judgment as they failed to refute and rebut the allegations set forth in the Bill of Particulars, that the defendants departed from acceptable standards of care in that they, *inter alia*, failed to review the plaintiff's medical history and make referrals to

physicians and/or medical facilities, specializing in high risk pregnancies, and that the evidence submitted fails to specifically set forth how the defendants followed the accepted standard of care in obstetrical practice.

Plaintiff submits as evidence, a redacted affirmation of a physician, board certified in obstetrics and gynecology, copies of the pleadings, and the deposition transcript of co-defendant Dr. Baggott

Defendants argue that their role in treating the plaintiff was limited and decisions regarding plaintiff's treatment during the times in dispute, were the responsibility of co-defendant physicians. They submit plaintiff's entire medical record, copies of the pleadings, deposition transcripts of both defendants and the plaintiff, and affirmation from Francis Chervenak, M.D., specializing in Obstetrics and Gynecology.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

The requisite elements of proof in a medical malpractice action are a deviation or departure from accepted community standards of practice and evidence that such departure was a proximate cause of injury or damage (***Stukas v. Streiter,*** 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept., 2011]; ***Barnett v. Fashakin, supra; Geffner v. North Shore Univ. Hosp.***, 57 A.D.3d 839, 871 N.Y.S.2d 617 (2d Dept., 2008); ***Flanagan v. Catskill Regional Med. Ctr.***, 65 A.D.3d 563, 884 N.Y.S.2d 131 [2d Dept., 2009]). On a motion for summary judgment, a defendant doctor has the burden of establishing the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby (*see* ***Rebozo v. Wilen***, 41 A.D.3d 457, 838 N.Y.S.2d 121 (2d Dept., 2007), ***Deutsch v. Chaglassian***, 71 A.D.3d 718, 896 N.Y.S.2d 431 [2d Dept., 2010]).

The supplemental Bill of Particulars, specific to Dr. Tomlinson, alleges acts of malpractice on his part by, *inter alia*, failing to perform a timely c-section; attempting to induce labor for an excessive amount of time; delaying a cesarean section thereby causing uterine atony; administering Picotin for a prolonged period of time; and causing plaintiff to undergo an hysterectomy. The affirmation of Francis A. Chervenak, M.D., provided a time line of Plaintiff's treatment and then indicated that in his opinion within a reasonable degree

of medical certainty that the care by Dr. Tomlinson, up until the time he transferred the patient's care to Dr. Dean was well within good and accepted standards of medical practice as was his plan of treatment. There is no evidence to support a finding that a cesarean section was called for on June 1, nor was Plaintiff in labor or suffering from arrest of descent on the morning of June 2, while under Tomlinson's care. Indeed, the affirmation submitted by Plaintiff's expert alleges that the failure of Dr. Tomlinson to refer Plaintiff to another hospital that specialized in high risk pregnancies was a departure, which caused Plaintiff's injuries. The failure to refer Plaintiff to another hospital was not a departure set forth in the bill of particulars.

Medical expert affidavits or affirmations, submitted by a defendant, which fail to address the essential factual allegations in the plaintiff's complaint or bill of particulars fail to establish *prima facie* entitlement to summary judgment as a matter of law (***Terranova v. Finklea***, 45 A.D.3d 572, 845 N.Y.S.2d 389 (2d Dept., 2007); ***Grant v. Hudson Val. Hosp. Ctr.,*** 55 A.D.3d 874, 866 N.Y.S.2d 726 (2d Dept., 2008); ***Barnett v. Fashakin,*** 85 A.D.3d 832, 925 N.Y.S.2d 168 92d Dept., 2011]). In this instance, the Defendant's expert affidavit, while not specifically mentioning the subsequent occurrence of arrest of descent on June 2, prolonged labor and risk of atoney specified that the care given by Dr. Tomlinson up until his transfer of her care at about noon on June 1, was well within good and accepted standards of medical practice and such treatment was neither a proximate cause or substantial contributing cause of Plaintiff's injuries.

Dr. Tomlinson established a *prima facie* showing of entitlement to summary judgment, thus it is Plaintiff's burden to rebut the defendant's showing (***Stukas v. Streiter, supra).*** Plaintiff failed to do so. Plaintiff's expert's conclusory affirmation failed to indicate how the treatment rendered was a departure, other than to indicate for the first time, that Dr. Tomlinson should not have treated Plaintiff, nor admitted her to South Nassau. Plaintiff also failed to address Defendant's proof that Tomlinson's treatment was not a proximate cause of Plaintiff's injuries, in that no proof was offered that Plaintiff would not have suffered the same result had Tomlinson transferred her to a hospital that specialized in high risk deliveries. Indeed, that assertion is highly speculative and not supported by this record.

The supplemental Bill of Particulars specific to Zachary Levokove, M.D. alleges that he committed acts of malpractice by, *inter alia*, failing to recognize and diagnose arrest of descent; in continuing with the course of labor and delaying the cesarean section despite being fully aware of patient's history of bed rest, incompetent cervix, pre-eclampsia, administration of magnesium sulfate and administration of lovenox; in failing to heed the significance of the compounding of such risks related to uterine atony and hemorrhage; continuing to instruct the patient to push despite arrest of descent; and placing patient in a dangerous environment by not immediately ordering and performing a cesarean section.

As to Dr. Levokove, as the in house attending OB/GYN physician his role was to assist Dr. Baggott, the treating OB/GYN in the performance of the cesarean section. Dr. Chervenak and the deposition transcripts of Levokove and Baggott, establish that Levokove assisted Baggott by providing her with exposure to the operative field, positioning retractors, cutting sutures and closing the operative site. Additionally, the atonic uterus was treated with methergin and hemabate and the uterus was massaged. The uterus responded to the treatment and was observed for ten minutes to insure that it remained firm. Chervenak opines that this treatment was within good and accepted standards of medical care and was not a proximate cause of Plaintiff's injuries.

One who assists a doctor during a medical procedure and who does not exercise any independent medical judgment, cannot be held liable for malpractice so long as the doctor's directions did not so greatly deviate from normal practice that the resident should be held liable for failing to intervene (***Muniz v. Katlowitz***, 49 A.D.3d 511, 856 N.Y.S.2d 120 [2nd Dept., 2008]). Here, the testimony of Dr. Baggott and Dr. Levokove indicates that Dr. Baggott ordered the caesarean section for the plaintiff. There is no indication that Levokove exercised any independent judgment nor did Plaintiff establish that Baggott's actions so greatly departed from normal practice that the attending should be held liable for failing to intervene. Indeed, Plaintiff's expert opined that there were other treatments that Levokove should have recommended and ensured that Baggott consider, but there is no evidence that those alternatives were not considered and rejected by Baggott, nor that the result would have differed had the recommendations been made.

Accordingly, the moving defendants, Levokove and Tomlinson are entitled to summary judgment dismissing the complaint and their motion is granted.

Plaintiff's motion pursuant to CPLR Article 16, is granted. The remaining defendants are precluded from obtaining and are deemed to have waived or forfeited the limited liability benefits of CPLR Article 16 in relation to the acts or omissions of Defendants Levokove and Tomlinson.

The foregoing constitutes the Order of this Court.

Dated: March 28, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.