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

PRESENT: JOAN B. LOBIS Justice

PART 6

SHAWNIKE CROOM,

-v-

ST. LUKE'S HOSPITAL

INDEX NO. 104319/10

MOTION DATE 9/11/12

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 18 were read on this motion to (for) partial summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-14
Answering Affidavits — Exhibits	15-18
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 20 2012
COUNTY CLERK'S OFFICE
NEW YORK

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 12/19/12

JBL
JOAN B. LOBIS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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SHAWNIKE CROOM, as Mother and Natural Guardian of CHRISTIAN CROOM, SHAWNIKE CROOM and RACHE CROOM, Individually,

Plaintiffs,

Index No. 104379/10

-against-

Decision and Order

ST. LUKES HOSPITAL OF NEWBURGH, DENNIS DOMOSI, MD, STEPHEN CESTARI, DO, WOMEN'S MEDICAL CARE OF HUDSON VALLEY, PC, DAVID COHEN, MD, IMAGING ON CALL, LLC, IMAGING ON CALL, PC, STEPHEN M. DALY, MD, RADIOLOGIC ASSOCIATES, PC, and HUDSON VALLEY IMAGING, PC,

Defendants.

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JOAN B. LOBIS, J.S.C.:

Defendant St. Luke's Cornwall Hospital s/h/a St. Lukes Hospital of Newburgh ("SLCH") moves for partial summary judgment pursuant to C.P.L.R. Rule 3212 dismissing plaintiffs' fourth and fifth causes of action. Plaintiffs Shawnike Croom, suing as mother and natural guardian of Christopher Croom, Shawnike Croom, suing individually, and Rache Croom, suing individually, oppose the motion. The remaining defendants take no position on the motion.

This medical malpractice action arises out of the hospitalization of Shawnike Croom on May 18, 2008, at SLCH. At about 4:00 a.m. on May 18, Ms. Croom arrived at SLCH via ambulance. She was approximately twenty-six weeks pregnant with Christian Croom and presented with vaginal bleeding. She was brought to the labor and delivery unit and was assessed by a nurse. At 4:30 a.m., Dennis Domosi, M.D., the on-call obstetrician, saw Ms. Croom and refused to order

tests to assess her condition. He informed her to go see her own doctor. He stated that Ms. Croom's bleeding was not an emergency and that it would have been a liability for him to treat another doctor's patient.

Upon Dr. Domosi's refusal, the nursing staff contacted Stephen Cestari, Chief of SLCH's Department of Obstetrics and Gynecology, who took over Ms. Croom's care. Between 4:45 a.m. and 8:10 a.m., Dr. Cestari ordered tests and was periodically updated by the nursing staff about Ms. Croom's condition. With the information communicated to him, he believed that Ms. Croom showed early signs of placental abruption, a condition where the placenta prematurely separates from the uterus. At approximately 9:00 a.m., a midwife from Dr. Cestari's department examined Ms. Croom and ordered blood tests. At approximately 10:20 a.m., Dr. Cestari examined Ms. Croom. He adhered to his initial impression that Ms. Croom showed early signs of placental abruption, but determined that she was stable. His examination also revealed that Ms. Croom showed preliminary signs of labor, as her cervix had begun to open and thin out. Because SLCH lacked the capacity to care for extremely premature newborns, Mr. Cestari arranged for Ms. Croom's transfer to Westchester Medical Center. He determined that although an emergency medical condition existed, the benefits of the transfer outweighed the risk of potential placental abruption. Ms. Croom was transferred to Westchester Medical Center by ambulance, where she underwent a caesarian section.

Plaintiffs commenced this action on or about April 5, 2010, asserting five causes of action. The first is on behalf of Ms. Croom and Christian Croom for medical malpractice. The second is the derivative claim of plaintiff Rache Croom, husband of Ms. Croom and father of

Christian. The third is for lack of informed consent. As to the fourth cause of action, plaintiffs allege that SLCH violated its internal policies and the Emergency Medical Treatment and Active Labor Act ("EMTALA") (42 U.S.C. § 1395dd), because Dr. Domosi did not perform an appropriate screening examination and disparately treated Ms. Croom. As to the fifth cause of action, plaintiffs allege that SLCH further violated EMTALA by failing to stabilize Ms. Croom prior to her transfer and by improperly transferring her knowing that she had an emergency medical condition.

SLCH seeks to dismiss plaintiffs' fourth and fifth causes of action, as lacking in merit. It contends that SLCH did not violate EMTALA because it properly screened Ms. Croom, as she was timely assessed by Dr. Cestari and a midwife in accordance to SLCH's rules and procedures. It argues that it complied with the transfer provisions under EMTALA, because although Ms. Croom had an emergency medical condition, Dr. Cestari properly executed a physician's certification stating that the benefits of transferring outweighed the risk of effecting the transfer, pursuant to 42 U.C.S. § 1395dd(c)(1)(A)(ii).

In support of its motion, SLCH submits the affidavit of Kathleen Sellick, a registered nurse. She states that she has been employed by SLCH since 1985 as a Staff Nurse and has served as the Clinical Nurse Manager since 1993. She also states that she is familiar with the policies for the Birthing Center that were in effect in 2008 and the requirements under EMTALA. She explains that when patients with Ms. Croom's similar condition arrive at SLCH, they are brought directly to the labor and delivery unit and they must be seen within eight hours by a certified nurse midwife or the patient's obstetrician. Additionally, the Evaluation/Observation of Obstetrical Patient policy

("Evaluation Policy") provides that "within six hours of the patient's arrival, the attending Obstetrician/Certified Nurse will make a determination as to whether the patient will be admitted, discharged or requires further observation." If the on-call obstetrician fails to evaluate and attend to the patient, the nursing staff is to notify the Chairman of the Department, who was then obligated to make sure that the patient receives the appropriate physician or midwifery care. In Ms. Croom's case, she was assigned to an on-call obstetrician, Dr. Domosi, because she did not have a physician with attending privileges at SLCH. When Dr. Domosi declined to evaluate her, Dr. Cestari was notified of Dr. Domosi's conduct, and Dr. Cestari undertook Ms. Croom's care management. Ms. Croom was seen by a midwife at approximately 9:00 a.m., and by Dr. Cestari shortly after 10:00 a.m., which is in compliance with the hospital's policies.

As to Ms. Croom's transfer, Ms. Sellick states that SLCH is a level II perinatal care hospital and is not qualified to deliver severely premature newborns of 25-26 weeks. SLCH's policy is to transfer pregnant women carrying premature fetuses of 25-26 weeks to a level III perinatal care hospital, such as Westchester Medical Center. She states that weighing the benefits and risks of a transfer is a medical judgment left to the physicians, and the hospital has no guidelines instructing them on which factors to consider.

In opposition, plaintiffs argue that summary judgment should be denied as there remain issues of fact whether SLCH complied with the screening, stabilization, and transfer provisions under EMTALA. They assert that EMTALA is a strict liability statute and that Dr. Domosi violated the statute by refusing to conduct a screening examination of plaintiff. They argue

that Dr. Cestari's subsequent screening did not cure the hospital of its violation. In support of their opposition, plaintiffs submit the affidavit of Lewis W. Marshall, Jr., M.D., who states that he is board certified in emergency medicine and internal medicine and is licensed in New York and New Jersey. He opines that by refusing to perform the mandatory screening exam, Dr. Domosi treated Ms. Croom differently from other patients, thereby violating EMTALA. He asserts that Ms. Croom's screening was delayed due to Dr. Domosi's refusal. He points out that Dr. Cestari did not review the ultrasound results until two hours and twenty-five minutes after the test was performed. He also notes that the midwife examined Ms. Croom one hour and fifty minutes after Dr. Cestari received those results and that Dr. Cestari evaluated Ms. Croom fifty minutes after that. Taken together, he adds, Ms. Croom experienced a four hour and fifteen minute delay. He states that a patient who presents with vaginal bleeding at week twenty-five of her pregnancy should receive prompt medical screening evaluation to assess the cause of the bleeding. Dr. Marshall also opines that, based upon Ms. Croom's bright red bleeding, she was not stable for a transfer and, instead, required "four units of packed red cells and two unit of fresh frozen."

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. N.Y. Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citations omitted). Once the movant establishes its entitlement to judgment as a matter of law, the burden shifts to the opposing party to raise an issue of fact. Winegrad, 64 N.Y.2d at 853.

EMTALA was enacted to prevent hospital emergency rooms from refusing to accept

or treat patients based only on the patient's financial status. Correa v. Hospital San Francisco, 69 F.3d 1184, 1189 (1st Cir. 1995); Brenord v. Catholic Med. Ctr. of Brooklyn and Queens, Inc., 133 F. Supp.2d 179, 184 (E.D.N.Y. 2001). EMTALA requires participating hospital emergency departments to screen patients for an emergency medical condition and, should an emergency medical condition be present, to stabilize the patient prior to releasing the patient, or to transfer the patient if certain conditions are met. 42 U.S.C. §§ 1395dd(a) - (c); see Cygan v. Kalieda Health, 51 A.D.3d 1373 (4th Dep't 2008).

Under EMTALA, the medical screening requirement states:

> In the case of a hospital that has a hospital emergency department, if any individual . . . comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition . . . exists.

42 U.S.C. § 1395dd(a). A hospital fulfills its statutory duty to screen patients if it complies with its standard screening procedures and provides the same level of screening "uniformly to those who present with substantially similar complaints." Correa, 69 F.3d at 1192. See Baber v. Hosp. Corp. of Am., 977 F.2d 872, 881 (4th Cir. 1992); Gatewood v. Washington Healthcare Corp., 933 F.2d 1037, 1041 (D.C. Cir. 1991). While a de minimus deviation from the hospital's rules and procedure does not violate the statute, a disparate screening, or refusal to screen at all, violates EMTALA. See Brenord, 133 F.Supp.2d at 187.

In this case, the Court finds that there remain issues of fact whether SLCH substantially adhered to its screening procedures. Although plaintiffs do not dispute that Ms. Croom received a screening examination at SLCH, Dr. Domosi's blatant refusal to treat plaintiff (by stating that Ms. Croom was a liability and that she should go to her own doctor, as noted in the hospital records) conflicts with SLCH's Evaluation Policy. The Evaluation Policy states that once notified, the attending obstetrician is to monitor the patient and determine within six hours of the patient's arrival whether the patient will be admitted, discharged or requires further observation. Dr. Domosi, as the initial attending physician, did not adhere to this policy. The procedure to which Ms. Sellick testified to be followed regarding a physician's refusal to treat is not included in SLCH's moving papers. Nor is such a provision contained in SLCH's Evaluation Policy. In addition, Ms. Sellick states that in her twenty-seven years as a nurse at SLCH, Dr. Domosi is the first physician that she is aware of who refused to treat a patient. Logically, all the other patients who have been screened at the Labor and Delivery unit with Ms. Croom's similar condition were not subjected to behavior similar to that of Dr. Domosi's, i.e., refusal to treat and instructions to leave the hospital. But for Dr. Domosi's conduct, SLCH's screening of Ms. Croom seems to have sufficiently complied with its procedures. In light of the disputed facts regarding Dr. Domosi's treatment of Ms. Croom, however, summary judgment as to this cause of action must be denied.

As to the stabilization and transfer provisions, EMTALA requires that when a patient has an emergency medical condition, the hospital should stabilize the patient or transfer the patient to another medical facility. 42 U.S.C. §§ 1395dd(b)(1). A hospital is not required to stabilize every patient with an emergency medical condition prior to transferring the patient to another facility.

EMTALA permits a transfer if a physician has executed a certification indicating that the "medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual." 42 U.S.C. § 1395dd(c)(1)(A)(ii). In addition, the transfer must be "appropriate." Id. at § 1395dd(c)(1)(B). A transfer is appropriate if the receiving facility has the capability to treat the patient, has available space, has agreed to the transfer, and has received the patient's medical record from the transferring facility. Id. at § 1395dd(c)(2). The transfer must also be accomplished with qualified transportation. Id.

Here, plaintiffs contend that Ms. Croom was unstable for transfer. SLCH, however, has demonstrated its prima facie entitlement to summary judgment, as it satisfied the requirements under EMTALA enabling it to transfer Ms. Croom even though she had been unstable. SLCH includes the Inter-Institutional Transfer Form ("Transfer Form"), which indicates that due to the unavailability of specialized care at SLCH, a transfer is necessary. It also states that based upon the information available to Dr. Cestari, the benefit of specialized care available at the receiving facility outweighed the risk of placental abruption. It indicates that Westchester Medical Center confirmed that it has the ability to provide the necessary medical treatment, available space, and qualified personnel, and had agreed to accept Ms. Croom. The Transfer Form further indicates that Ms. Croom was transported by ambulance and that a copy of Ms. Croom's progress notes from SLCH was included with the transfer. In addition, Ms. Croom consented to the transfer and signed the Transfer Form. Plaintiffs do not dispute any of the information contained in the Transfer Form. Thus, SLCH has shown that it complied with EMTALA's transfer provisions. Accordingly, it is

ORDERED that the portion of Defendant St. Luke's Cornwall Hospital s/h/a St. Lukes Hospital of Newburgh's summary judgment motion seeking to dismiss plaintiffs' fourth cause of action is denied; it is further

ORDERED that the portion of Defendant St. Luke's Cornwall Hospital s/h/a St. Lukes Hospital of Newburgh's summary judgment motion seeking to dismiss plaintiffs' fifth cause of action is granted; it is further

ORDERED that the parties shall appear for a pretrial conference on Tuesday, February 5, 2013, at 9:30 a.m.

Dated: December 19, 2012

ENTER:

JOAN B. LOBIS, J.S.C.