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

ALICE SCHLESINGER

**PRESENT:** _____ **IA PART 16**
*Justice*

**PART** _____

Index Number : 800168/2010
HINES, SABRINA
vs.
LENOX HILL HOSPITAL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

**INDEX NO.** _____

**MOTION DATE** _____

**MOTION SEQ. NO.** _____

**The following papers, numbered 1 to** _____ **, were read on this motion to/for** _____

**Notice of Motion/Order to Show Cause — Affidavits — Exhibits** _____ **No(s).** _____

**Answering Affidavits — Exhibits** _____ **No(s).** _____

**Replying Affidavits** _____ **No(s).** _____

**Upon the foregoing papers, it is ordered that this motion is** granted to the extent of severing and dismissing the cause of action sounding in lack of informed consent and is otherwise denied in accordance with the accompanying memorandum decision.

**FILED**

JUL 10 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

**Dated:** JUL 08 2013

_____, J.S.C.

ALICE SCHLESINGER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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SABRINA HINES, as Mother and Natural Guardian of BRYCEN HINES, an Infant, and SABRINA HINES, Individually,

Index No. 800168/10
Mot. Seq. No. 002

Plaintiffs,

-against-

LENOX HILL HOSPITAL and JOHN M. MIGOTSKY, M.D.,

Defendants.



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SCHLESINGER, J.:

The motion before the Court, brought by the sole remaining defendant Dr. John M. Migotsky, involves a birth injury that occurred during a scheduled C-Section delivery of the infant Brycen Hines on May 1, 2009 at Lenox Hill Hospital. Specifically, Brycen Hines suffered a fracture of his right humerus at that time.

The plaintiff mother Sabrina Hines was under the care of Dr. Migotsky during the prenatal period. Perhaps because she had given birth to a baby girl in 2002 by C-Section at Mt. Sinai Hospital because the baby was in a breeched position, she decided on April 28, 2009 to have another C-Section. The one at issue here was scheduled for May 1, 2009.

It appears that a junior resident, Dr. Patty Ng, actually performed the delivery under the supervision of the defendant doctor, who was present during the procedure. Both doctors were deposed during discovery.

The motion is supported by an affidavit from the defendant doctor himself; there is no supporting affirmation from a disinterested, non-party obstetrician. Dr. Migotsky states that anesthesia was given to the mother at 3:20 p.m. and that the incision was made by Dr. Ng, the resident, at 3:37 p.m. The defendant goes on to say that it was a scheduled

[* 3]

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uterine incision made in anticipation of a normal baby. He states further that during the extraction of the baby, the anterior arm or the arm closest to Ms. Hines' belly was delivered, and a pop was felt consistent with a possible fracture. When this happened, Dr. Migotsky said to the plaintiff Ms. Hines that it looked like the humerus had been fractured but that the baby's prognosis was excellent. (See Exh L to motion).

Dr. Migotsky describes what he was doing during the extraction of the baby. He states (at ¶ 19) that while Dr. Ng was inserting her hand behind the vertex, "I would typically be applying gentle pressure on the fundus to help the resident guide the shoulders out." He then gives his opinion that the amount of pressure which was applied was not excessive and was completely consistent with the standard of care. He adds that he had never discussed the possibility of a bone fracture with Ms. Hines during her pregnancies, as it is a rare event. He concludes by saying that this was an injury that can and did occur without any departure from accepted standards of obstetrical care.

In opposition, counsel argues that the moving defendant has failed to establish a prima facie case because all he purportedly did was present a recital of the medical events surrounding the infant's delivery and give bare, conclusory assertions that he and his resident acted in conformity with the appropriate standards of care. In support of plaintiff's own position, counsel submits an affirmation from a New York board certified obstetrician, who is also a Clinical Associate Professor at the School of Medicine of the State University of New York at Stony Brook.

I believe that counsel makes a good argument here, by giving a good depiction of Dr. Migotsky's affidavit. However, I do not think it is necessary to make a finding of whether or not a prima facie case has been established because, in the final analysis, the

submission by the plaintiff in opposition does succeed in putting the actions of Dr. Migotsky in issue. That submission includes an affirmation from an unnamed obstetrician, who has delivered countless babies and who has reviewed all the records here and the examinations before trial. That expert opines that the fracture of the baby's arm here was the result of departures from accepted standards of obstetrics and could have been avoided. The standard of care, again according to the plaintiff's expert, required the creation of a uterine incision and an operative field that was large enough to safely deliver this baby. In other words, he asserts the uterine incision should have been made bigger.

Dr. Ng testified at her deposition that during the extraction of the infant, there was difficulty delivering the shoulder because the infant's right arm was in a difficult, posterior position, meaning that it was behind the infant's back. Further, there existed uterine adhesions that seemed to have obstructed her ability to manipulate the baby. But the plaintiff's expert says that if in fact uterine adhesions were sufficient to obstruct the safe extraction of the infant, then a wider uterine incision and/or lysing of the adhesions would have resolved the obstruction. Finally, he points out that this was not an emergency situation and that, therefore, the doctors had enough time to do what was necessary to insure a safe delivery.

Dr. Ng also testified at her deposition that she and defendant Dr. Migotsky did discuss the possibility of extending the incision, "but due to adhesions to adjacent organs, I believe it was not possible at the time." However, in response to this statement, plaintiff's expert says, with a reasonable degree of medical certainty, that under these circumstances, the standard of care required that the doctors make a T-shaped uterine incision, which would have created a larger field and would not have interfered with any adjacent organs.

However, it is interesting to note that Dr. Migotsky testified at his deposition that the adhesions did not interfere with the operative field or the delivery of the baby and that he did not have discussions with Dr. Ng with regard to these adhesions. Finally, also in his deposition, Dr. Migotsky testified that he had no idea how the fracture occurred.

Again, plaintiff's expert states, with a reasonable degree of medical certainty, that this injury could not have occurred without a departure from accepted medical standards. He emphasizes that this was not an event, a humerus fracture, which would occur during a C-Section delivery with no complications unless there was some negligence by the doctors.

Significantly, the opposition papers omit any mention of the cause of action sounding in informed consent. This omission does not go unnoticed by the moving defendant. Since Dr. Migotsky stated that he explained all the complications that could be anticipated, his counsel argues that defendant established a prima facie case with regard to the informed consent cause of action. I agree, and since plaintiff fails to address it, the informed consent claim is dismissed.

However, I reach a different conclusion vis-a-vis the main claim of malpractice against Dr. Migotsky. Despite the arguments made by defense counsel in Reply, there is no question but that the opposing expert, who has the requisite credentials to opine, does so persuasively and makes it clear that the fracture here was avoidable if the attending physicians had made a wider incision in the uterus and cleared away adhesions so that the view of the infant and his arm was not unobstructed.

Finally, moving counsel accuses the obstetrician for the plaintiff of failing to explain how precisely the fracture occurred here. But such an omission does not doom his opinion, particularly in light of Dr. Migotsky's admission that he did not know why the fracture occurred, and he was there!

Accordingly, it is hereby

ORDERED that the motion for summary judgment by defendant John M. Migotsky, M.D. is granted to the extent of severing and dismissing the cause of action sounding in lack of informed consent, and is otherwise denied; and it is further

ORDERED that counsel shall appear in Room 222 for a pre-trial conference on Wednesday, August 7, 2013 at 9:30 a.m. prepared to discuss settlement and select a trial date.

Dated: July 8, 2013

J.S.C.
ALICE SCHLESINGER

FILED
JUL 10 2013
NEW YORK
COUNTY CLERK'S OFFICE