

Hunter v Richmond Univ. Med. Ctr.

2013 NY Slip Op 33020(U)

December 3, 2013

Supreme Court, Richmond County

Docket Number: 101954/09

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 101954/09
Motion No.: 002, 003**

**ANGEL HUNTER, an Infant by his Mother and
Natural Guardian, LISA AVETA, and
LISA AVETA, Individually,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**RICHMOND UNIVERSITY MEDICAL CENTER,
MICHAEL MORETTI, M.D., and
MARINO A. POLISENO, D.O.,**

Defendants

The following items were considered in the review of the following motions for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Memorandum of Law	2
Notice of Motion and Affidavits Annexed	3
Memorandum of Law	4
Affirmation in Opposition	5
Affirmation in Reply	6, 7
Supplemental Reply	8
Supplemental Affirmation in Opposition	9
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendants, Richmond University Medical Center (“RUMC”) and Michael Moretti, M.D., (“Dr. Moretti”) each move for summary judgment dismissing the plaintiffs’ complaint.

The motions are denied.

This is an action to recover for personal injuries allegedly sustained by Angel Hunter as a result of medical malpractice. The plaintiff, Lisa Aveta (“Aveta”) presented to the Prenatal Clinic at RUMC on January 11, 2008. At the time that Aveta presented to the clinic she testified

during her deposition that she was not treating with a particular physician, but saw different physicians at each visit. On January 15, 2008 a sonogram was interpreted by Dr. Moretti. He estimated that the gestational age was 14 weeks and that the delivery date would be approximately July 15, 2008. At that time Aveta was 25 years old, approximately 150 pounds and smoked 2-3 cigarettes per day. She also was diagnosed with seizure disorder, asthma, umbilical hernia and cholecystectomy. Moreover, she had been pregnant thirteen times prior to this pregnancy. Two pregnancies resulted in term birth; two pregnancies resulted in pre-term births; nine pregnancies were terminated by abortion or miscarriage; and at the time of her presentation to the RUMC clinic Aveta had three living children. As a result of this history, Dr. Moretti directed Aveta to the High Risk Clinic at RUMC.

Aveta returned to the RUMC Clinic on January 23, 2008 and was seen by Dr. Moretti. At that time Dr. Moretti noted that there was no rupture of membranes nor was there any bleeding. Aveta was advised to return to the clinic in three weeks and consult with a genetics counselor. Aveta returned to the RUMC Clinic on February 13, 2008, but was not seen by Dr. Moretti. She returned again on March 7, 2008 where a level II ultrasound (fetal anatomy survey) was performed. The ultrasound was interpreted by Dr. Moretti and a copy was sent to the High Risk Clinic for review by the managing obstetrician.

On April 5, 2008 Aveta was emergently admitted to Labor and Delivery at RUMC under the care of Dr. Simon Kokkinakis for complaints of leaking amniotic fluid and to rule out pre-term labor. On April 7, 2008 a sonogram was performed and subsequently interpreted by Dr. Moretti. At that time Dr. Moretti interpreted the study and noted it was normal. On April 8, 2008 an amniocentesis was performed by Dr. Moretti under ultrasound guidance to rule out rupture of membranes and bacterial infection. According to Dr. Moretti's evaluation the amniocentesis ruled out any evidence of bacterial infection. Aveta was discharged on April 8, 2008 with instructions to follow up in the High Risk Clinic on April 10, 2008. According to records Aveta failed to keep her appointment on April 10, 2008.

On April 23, 2008 Aveta was seen in the RUMC Prenatal Clinic, but was not seen by Dr. Moretti.

On May 6, 2008 Aveta presented to RUMC with complaints of contractions. A fetal fibronectin test was performed and the result reported as positive. A positive test indicates that the fetal fibronectin proteins, which act as a glue during pregnancy, attach to the amniotic sac to the lining of the uterus. A positive fibronectin test may indicate that the fibronectin has been disturbed and that the mother is at a greater risk of pre-term labor. A vaginal exam showed that Aveta was 2 cm dilated, 50% effaced and at a -3 station. A tocometer found occasional contractions. Aveta was discharged with a prescription for oral terbutaline with instructions to return on May 8, 2008.

The next day, May 7, 2008 at approximately 3:40 p.m. Aveta was admitted to the Antepartum Unit at RUMC for suspected pre-term labor. Upon admission, external fetal monitoring (“EFM”) was placed and revealed a fetal heart rate (“FHR”) in the 140s with moderate variability. On May 8, 2008 at 2:43 a.m. Dr. Lindenbaum reviewed the FHR tracing because the FHR went down to 60 for 30 seconds, returning rapidly to a baseline of 140. At 8:30 a.m. a sonogram was performed and subsequently reviewed by Dr. Moretti. At that time Dr. Moretti determined that the ultrasound returned results were within normal limits.

On May 8, 2008 Dr. Moretti was aware that Aveta had positive fetal fibronectin test on May 6, 2008. Such a test may be a marker for pre-term labor, but Aveta was once again discharged. Subsequently, on May 14, 2008 at 1:00 a.m. Aveta presented to RUMC indicating that there had been fluid leakage since 6:00 p.m. on May 13, 2008. She was admitted with a diagnosis of pre-term premature rupture of membranes. An emergency Cesarean section was performed by Dr. Carol Russel because she was concerned about a possible infection. A post-operative report dictated by Dr. Russell indicates that the amniotic fluid was stained with meconium; and a pathology review of the placenta and cord revealed “severe acute chorioamnionitis.”

The plaintiffs allege that as a result of deviations from good and accepted medical practice the plaintiff, Angel Hunter, suffered the following damages: global developmental delays, brain damage, mental retardation, central nervous system injury, neurological/cognitive deficits, motor delays, cerebral palsy, seizure disorder, the need for speech, language, occupational, feeding, and physical therapies, the need for special education, inability to live independently, diminished earning capacity, and loss of enjoyment of life.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion”.¹ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.² As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.³ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁴ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁵

“On a motion for summary judgment, a defendant doctor has the burden of establishing

¹ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

² *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

³ *Rotuba Extruders v. Ceppos.*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁴ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁵ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

the absence of any departure from good and accepted medical practice or that the plaintiff was not injured thereby. . . In opposition, the plaintiff must submit a physician's affidavit attesting to the defendant's departure from accepted practice, which departure was a competent producing cause of the injury . . . General allegations that are conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice are insufficient to defeat summary judgment . . ."⁶

The defendants submit the following expert affidavits: Daniel Skupski, M.D., a physician board certified in Obstetrics and Gynecology and Maternal-Fetal Medicine; Robert Koppel, M.D., a physician board certified in Pediatrics and Neonatology; and Lewis Rosenberg, M.D., a physician board certified in Obstetrics and Gynecology. Each of these experts conclude that RUMC and Dr. Moretti performed within the standard of care.

The plaintiffs submit the expert affirmations of: Bruce L. Halbridge, M.D., board certified in Obstetrics and Gynecology; and Stuart J. Danoff, M.D., board certified in pediatrics. Not surprisingly, the plaintiffs' experts opine that the defendants RUMC and Dr. Moretti deviated from the standard of care during the pregnancy of Lisa Aveta and the birth of Angel Hunter. Consequently, such divergent opinions based on the same set of facts require that this case be resolved by a jury.⁷

Accordingly, it is hereby:

ORDERED, that the motions made by the defendants, Richmond University Medical Center and Michael Moretti, M.D. are denied; and it is further

ORDERED, that this action is hereby transferred to **JCP 8, 18 Richmond Terrace, on Monday, January 27, 2014 at 9:30 a.m.**; and it is further

⁶*Rebozo v. Wilen*, 41 AD3d 457, [2d Dept 2007].

⁷ See, *Altman v. Alpha Obstetrics and Gynecology, P.C.*, 255 AD2d 276 [2d Dept. 1998].

ORDERED, that the parties must supply a list of HIPAA compliant authorizations that will be needed for trial to opposing counsel at the time the case first appears on the JCP 8 calendar. Thereafter, HIPAA authorizations are to be served within sixty (60) days.

ENTER,

DATED: December 3, 2013

Joseph J. Maltese
Justice of the Supreme Court